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RIGHT OF GUARDIAN TO COMPROMISE CLAIMS ON BEHALF OF HIS WARD.

It is undoubtedly the general rule, unless limited by statute, that a guardian has authority to compromise and release claims or demands on behalf of his ward, and the ward will be bound thereby, unless done in bad faith and in fraud of his rights. Manion v. Ohio Valley Railway Co., 99 Ky. 504, 36 S. W. Rep. 530; Hagy v. Avery, 69 Iowa, 434; Schee v. McQuilken, 59 Ind. 269; Maclay v. Assurance Society, 152 U. S. 499. But the question that arises at this time, and one which interests the practicing attorney is as to what circumstances will justify the charge of bad faith against a guardian in the making of a compromise.

In this connection, attention might first be called to the fact that a compromise made by a guardian of a baseless and unjust claim agains this ward will not be upheld in a court of equity as to either guardian or ward. Underwood v. Brockman, 34 Ky. (4 Dana) 309, 29 Am. Dec. 407.

We go a step further and assert the rule to be that even in the absence of fraud a compromise which is ridiculously and disproportionately unfair to the ward will not bind his estate. Thus, a compromise, by which a guardian holding a note against a solvent maker, settled with the maker for one-third the face of the note, is not a legally effective compromise, and the guardian will be held to personally account for the whole note. Darby v. Stribling 22 S. Car. 243. This case is made stronger by the fact that the note involved was given for the purchase price of a slave, and, since the compromise occurred right after the war when it was considered doubtful whether negro debts were collectible at all, there would seem to be some ground for compromise. It would seem, however, that a decision of the South Carolina Supreme Court had strongly asserted the validity of negro debts. The court in holding the guardian liable for the full amount of the note, said: "The amount of the judgment taken by the guardian represents but a fraction more than one-third of the amount of the note, without reference to the accrued interest for some seventeen years. There can be no doubt that at the time the judgment was taken the note was amply secured. Whilst there was doubt and uncertainty for several years after the war about the collection of notes of this character, yet all such doubts were solved and removed by the decision of this court, filed April 3, 1871. * * * The judgment acquiesced in by the guardian is in direct conflict with this decision, filed seventeen months prior to said judgment. Under these circumstances, the act of the deceased guardian cannot be considered prudent, nor can we conclude that the guardian has exercised proper care and diligence in protecting the rights and interests of his ward." It would seem necessary from this decision for the guardian to keep himself posted as to the latest decisions of his own supreme court, at least when he attempts to make a compromise. To same effect: Culp v. Stanford, 112 N.Car.664, 16 S. E. Rep. 761, where a guardian was held liable for accepting on behalf of his wards an amount less than they were entitled to receive from a fund, without seeking to ascertain the true amount other than by asking counsel for the party from whom the fund is payable.

In some states the approval of the court is necessary to give effect to a compromise. Under such a statute failure to secure the approval of the court invalidates the compromise. Davis v. Beall, 21 Tex. Civ. App. 183, 50 S. W. Rep. 1086; Hayes v. Life Insurance Co., 125 Ill. 626, 18 N. E. Rep. 322. The latter case cited shows the effect of such a compromise on the party with whom the compromise was made. In that case the guardian, without the court's approval, surrendered a policy of life insurance for less than the full amount due thereon. The court held that the company assisting to bring about such surrender was affected with notice of such want of authority, and became liable for the conversion of the policy in an action by the ward without previous demand. The court said: "In respect to the compromise attempted to be effected and the release executed by the guardian, the record fails to show that the same was submitted to and approved by the county court. Defendant in error was charged with notice of the guardian's want of power to bind his wards by any

agreement of compromise involving the acceptance of a less sum than the full amount due, or by a surrender of the possession of the instrument evidencing such indebtedness, upon a consideration less than the full amount due thereon; and the act of defendant in error in inducing and bringing about such surrender, and in accepting the possession of the instrument was, as against these wards, clearly tortious."

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—WHETHER FELLOW-SERVANT RULE SHOULD BE SUSPENDED IN CASES OF MINORS UNDER FOURTEEN YEARS OF AGE.—Some of our contemporaries are animadverting quite severely on the recent case of Evans v. Josephine Mills, 46 S. E. Rep. 674, in which the court held that the risk arising from the negligence of fellow servants is not potent and, therefore, there is no presumption that the same was assumed by an infant of tender years. On this interesting and important question of law, the court said:

"If the plaintiff, in this case, was free from fault, and was injured by a fellow servant, she cannot recover, unless the fact that she was a minor under the age of 14 takes her without the operation of the fellow-servants' rule. There are cases which hold that this doctrine is applicable to infants. Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698 (18); King v. Boston, etc., Co., 9 Cush. 112 (17); Curran v. Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. (between 14 and 15); Fones v. Phillips, 39 Ark. 23, 43 Am. Rep. 264 (nearly 14); Brown v. Maxwell, 6 Hill, 592, 41 Am. Dec. 771; Greenwald v. Marquette, H. & O. Ry. Co., 49 Mich. 197, 13 N. W. Rep. 513 (17); Pittsburg, C. & St. L. Ry. Co. v. Adam, 105 Ind. 153, 5 N. E. Rep. 187 (under 21); Fisk v. Central R. R. Co., 72 Cal. 38, 13 Pac. Rep. 144, 1 Am. St. Rep. 22 (12); Lovell v. De Bardlaben Co., 90 Ala. 15, 7 So. Rep. 756 (where the court construed the declaration to mean that plaintiff was over 14); Hefferen v. Northern P. R. R. Co., 45 Minn. 471, 48 N. W. Rep. 1, 526 (17); Smillie v. St. Bernard Dollar Store, 47 Mo. App. 404 (10); Craven v. Smith, 89 Wis. 125, 61 N. W. Rep. 317 (11). In other cases it has been held that the doctrine exempting the master from liability to one servant for injuries inflicted by the negligence of a fellow servant is based upon the theory that such risks are among those assumed in the contract of employment, and that 'if the injured employee is a child incapable of comprehending that risk, the rule ought not to apply.' Hinckley v. Horazdowsky, 133 Ill. 379, 24 N. E. Rep. 421, 8 L. R. A. 490, 23 Am. St. Rep. 618. In Houston & G. N. R. Co. v. Miller, 51 Tex. 270, the court held that, while the fellow-servant rule should apply to one under 21 years of age, it should not be enforced against a child of tender years. See, also, Evans v. American Iron Co. (C. C.), 42 Fed. Rep. 519. Compare So. Agricultural Works v. Franklin, 111 Ga. 319, 323, 36 S. E. Rep. 693. From the dissenting opinion in Atlanta Co. v. Speer, 69 Ga. 158, 47 Am. Rep. 750, and from the foregoing cases, it will be seen that all the authorities hold that the fellow-servant rule applies over the age of 14. As to those under that age there is a conflict. Some authorities, for cogent reasons, hold that the doctrine is not applicable to infants of tender years. And, without noting the distinction between those over and those under 14, such is the clear intimation in Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838. All children are chargeable with the result of failing to exercise the due care which their physical and mental capacity fits them for exercising. Civ. Code 1895, § 2901. They are daily brought into the presence of known dangers which they may be reasonably expected to avoid. But the risk from the negligence of fellow servants, which, as matter of law, is presumed to be assumed in the contract of employment, is the risk of an unknown contingent, and legal danger, which would make no impression upon the mind of a child of tender years. It is not like a peril obvious to the senses, the very presence of which apprehension, and, when coupled with the fear of pain, is calculated to make the infant avoid it. Nor is it like the responsibility for the violation of a criminal statute, where the minor is to be punished for what it itself does, and where the implied knowledge of the criminal statute is generally aided by the child's conscience and intuitive knowledge that the act is in itself wrong. Pen. Code 1895, § 33. The line must be drawn somewhere, and, with variation below that age depending on its capacity, the time of responsibility has been absolutely fixed at 14. For some purposes after reaching that age infants are classed as adults. They can then make wills (Civ. Code 1895, § 3265); select their guardians (Civ. Code 1895, § 2516); and females can contract marriage (Civ. Code 1895, § 2412). They then become amenable to the criminal law, and, by analogy, are presumed to assume the risks which the law makes incident to their contract of employment. But under that age, while they may be charged with the duty of avoiding dangers of which they know, there is no presumption that they contract to assume the risks which are not patent, of which they do not know, and which relate to the contingent act of a third person. The plaintiff proved her case substantially as laid in the amended petition, and, under the circumstances, a nonsuit should not have been granted; but the matter should have been referred to the jury, to determine whether the fellow servant, in starting the machine, was guilty of an act of negligence in relation to the plaintiff."

IMPEACHMENT OF WITNESSES BY PROOF OF SPECIFIC WRONGFUL ACTS.

PART I.

How Character May be Shown.—The character of a witness for truth and veracity, and in some jurisdictions for morality, is a material matter as affecting the credit to be given him. The general estimation in which he is held, in the neighborhood where he lives, as to these characteristics is logically and legally relevant, for this purpose, and may be shown by any competent witness who knows the reputation he has there established; but this reputation is logically relevant only in that it may be safely inferred that it is a reflex of his true character in this respect at the time the issue of credit is raised.[1] Individual knowledge by the impeaching witness of particular acts of the witness clearly indicative of his character in this respect is also logically relevant to his true character, but it is not legally relevant. It is thoroughly established that: The credit of a witness can, by witnesses other than the witness himself, be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue raised by the pleadings.[2] The reasons for this are manifest: Such a course would cause the inquiry, which ought to "correspond with the allegations and be confined to the point in issue," to branch out into an indefinite number of issues. The characters, not only of the witnesses to the matter at issue, but of each of the impeaching witnesses, might be assailed by separate charges, and, loaded with such an accumulated burden of collateral matter, the minds of the jury would be thrown into inextricable confusion, and the administration of justice would be impracticable. Another reason is that no man can come prepared to defend his character against all charges which might thus be brought against it; for though every man may be supposed capable of defending his general character, he can not be prepared to defend it against particular charges of which he has no previous notice.[3]

Noting the reasons for the rule prohibiting particular acts to be shown by outside witnesses, it is perfectly patent that the rule can have no application where the questions as to such facts are put to the witness himself on cross-examination, since the witness knows the facts in the matter, and may be safely trusted to make his answer no worse on himself than the facts demand, and should he make it lighter than the facts warrant the inquiry is, by his answer, imperatively closed, for no rule has met with more universal approval than that which says: A witness can not be cross-examined to any fact that is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence; and if a question is put to a witness about any such fact his answer thereto is conclusive against the party putting the question.[4] This rule excluding evidence of particular facts *aliunde* the witness himself renders all the more necessary the right to show them by the witness on cross-examination, and most of the courts, as will be shown in the succeeding paragraphs, allow a liberal course of cross-examination along this line.[5]

[1] See article by Davies in 54 Cent. L. J. 303.

[2] In some states there are statutory provisions permitting convictions to be shown by third persons.

[3] Buller's Nisi Prius, 296; Starkie on Ev. (10th Ed.) 237; Rex v. Rockwood, 13 How. St. Tr. 210; Rex v. Layer, 16 How. St. Tr. 285; Gaines v. Relf, 12 How. (U. S.) 472, 554; Feibilman v. Manchester, etc., Co., 108 Ala. 180, 19 So. Rep. 540, 548; Robinson v. State, 40 Fla. 509, 24 So. Rep. 474; Griffith v. State, 140 Ind. 163, 39 N. E. Rep. 440; State v. Guy, 106 La. 8, 30 So. Rep. 268; Seymour v. Farwell, 51 Mo. 95; Corning v. Corning, 6 N. Y. 97, 104. There is, however, authority for the proposition that the trial court has some discretion even in this matter. Powers v. Lachy, 26 Vt. 270, 277, per Redfield, C. J. And this discretion will be cautiously reviewed on appeal. Ellsworth v. Potters, 41 Vt. 685.

[4] Starkie on Ev. (10th Ed.), 200, 202, 237; Greenl. on Ev. sec. 449; Spenceley v. DeWillott, 7 East, 108; Watson's Case, Guerney's Rep. 2 vol. 288; United States v. White, 5 Cranch. C. C. 38; United States v. Dickinson, 2 McLean, 325; Rosenbaum v. State, 33 Ala. 354; Blakely v. Blakely, 33 Ala. 611; Seale v. Chambliss, 35 Ala. 19; People v. McKeller, 53 Cal. 65; People v. Dye, 75 Cal. 112, 16 Pac. Rep. 537; Faulkner v. Rodni, 104 Cal. 140, 37 Pac. Rep. 883, 886; Winton v. Meekers, 25 Conn. 456; Livingston v. Roberts, 18 Fla. 70; Eldridge v. State, 27 Fla. 162, 9 So. Rep. 448; Moore v. People, 108 Ill. 484; Simmons v. Busby, 119 Ind. 13, 21 N. E. Rep. 451; Cokely v. State, 4 Iowa, 480; Clark v. Reininger, 66 Iowa, 507, 24 N. W. Rep. 16; Com. v. Buzzell, 16 Pick. 153, 157; Com. v. Jones, 155 Mass. 170, 29 N. E. Rep. 467; Com. v. Smith, 162 Mass. 508, 39 N. E. Rep. 111; People v. Hillhouse, 80 Mich. 580, 45 N. W. Rep. 484; Harper v. Indianapolis, etc., Ry. Co., 47 Mo. 567, 581; Lobart v. Buchanan, 50 Mo. 201; State v. Taylor, 134 Mo. 109, 154, 35 S. W. Rep. 154; Scharf v. Grossman, 59 Mo. App. 199; Smith v. State, 5 Neb. 181 (approved in Carter v. State, 36 Neb. 481, 54 N. W. Rep. 853; McDuffee v. Bentley, 27 Neb. 380, 43 N. W. Rep. 123; Seavy v. Dearborn, 19 N. H. 355; Combs v. Winchester, 59 N. H. 13, 75 Am. Dec. 203; Pullen v. Pullen, 43 N. J. Eq. 136, 6 Atl. Rep. 887; Lawrence v. Barker, 5 Wend. 301; Stokes v. People, 53 N. Y. 164, 175; Furst v. Ry. Co., 72 N. Y. 542; Morris v. Atlantic Ry. Co., 116 N. Y. 552, 22 N. E. Rep. 1097; State v. Patterson (N. Car), 2 Ired. 346, 38 Am. Dec. 699; State v. Roberts, 81 N. Car. 605; State v. Morris, 109 N. Car. 820, 13 S. E. Rep. 877; Clinton v. State, 33 Ohio St. 27; Hester v. Com., 85 Pa. St. 139; Goodall v. State, 1 Oreg. 333, 80 Am. Dec. 396; Gulf, etc., Ry. Co. v. Coon, 69 Tex. 730, 7 S. W. Rep. 492; Hall v. State, 66 S. W. Rep. 783, 786; Stevens v. Beach, 12 Vt. 585, 36 Am. Dec. 359; Powers v. Leach, 26 Vt. 270, 277; Alger v. Castle, 61 Vt. 53, 17 Atl. Rep. 727; State v. Payne, 6 Wash. 563, 34 Pac. Rep. 317.

[5] In Kentucky, Massachusetts, and Missouri there are cases in which the rule against asking other witnesses as to particular facts outside the issue for impeachment purposes has been applied to the cross-

Past Life of Witness—Cross-Examination Thereto.—How far the witness may be interrogated on cross-examination as to reprehensible conduct occurring in his past life is a matter of great conflict and confusion in the adjudicated cases and treatises. Formerly a distinction was made between questions, material to the issue joined, the direct effect of the answer to which would be to show degradation, and those calling for an answer which would merely tend to show degradation. The former he was excused from answering.[6] the latter he was not.[7] But this distinction no longer obtains.

It is an elementary principle in the law of evidence that on cross-examination of a witness as to any fact or facts, testified to by him, material to the issue joined, a thorough and searching course is allowable—indeed it is a matter of right[8]—so long as the questions do not subject the witness to needless indignity,[9] or impinge upon his protection from self-incrimination; and, as a part thereof, it is proper to ask any question that will tend to test the accuracy, veracity, or credibility of the witness. The mental and moral make-up of a witness is an essential factor in determining the credit to which he is entitled. Many questions that are entirely irrelevant and immaterial as to the issues joined by the pleadings are relevant and material to the development of this ancillary question of fact.

It has been frequently laid down that inquiries on topics to discredit a witness, and the extent to which such inquiries may be pressed, are matters very generally committed to the sound discretion of the trial court—that the court may and should permit such inquiries where the ends of justice seem to demand it, but they should be excluded when a disparaging course seems unjust to the witness, and uncalled for under the circumstances of the case.[10] Whilst this discretion will be reviewed on appeal only when there has been manifest abuse thereof,[11] yet in its exercise the court should keep in mind the principle that truth is the objective in courts of justice, and private feelings must yield to the ne-

examination of the witness himself. Sodusky v. McGee, 5 J. J. Marsh. 621; Holbrook v. Dow, 12 Gray, 357; State v. Gesell, 124 Mo. 531, 27 S. W. Rep. 1101. In Alabama this seems to be the established practice. Morgan v. State, 88 Ala. 223, 6 So. Rep. 761; Lowery v. State, 98 Ala. 45, 13 So. Rep. 498.

[6] Cook's Case, 13 How. St. Tr. 311, 1 Salk. 153; MacBride v. MacBride, 4 Esp. 242; R. v. Lewis, 4 Esp. 225; People v. Mather, 4 Wend. 229, 250, 21 Am. Dec. 122; Sothard v. Rexford, 6 Cow. 254; Lambert v. People, 9 Cow. 577, 625; Respublica v. Gibbs, 3 Yeates, 429, 437; Galbreath's Lessor v. Eichelberger, 3 Yeates, 515; Vaughan v. Perrine, 3 N. J. L. 728; Fries v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 52; Peake's Ev. 202. But see Rex v. Edwards, 4 T. R. 440, and Starkie on Evidence, 207, 213.

[7] Per Lord Ellenborough in Parkhurst v. Lowten, 1 Meriv. 400, 2 Swanst. 194, 216; Foss v. Hogness, 1 Reding. 81; People v. Mather, 4 Wend. 232, 252, 21 Am. Dec. 122; MacBride v. MacBride, 4 Esp. 242; Cundell v. Pratt, M. & M. 108.

[8] As to what constitutes a thorough and searching cross-examination is a matter resting largely in the discretion of the trial court.

[9] Commonwealth v. Sackett, 22 Pick. 394; O'Donnell v. Segar, 25 Mich. 367, 370; Chandler v. Allison, 10 Mich. 460, 476; N. Y. Iron Mine v. Negaunee Bank, 39 Mich. 644, 658; Langley v. Wadsworth, 99 N. Y. 63, 1 N. E. Rep. 106; Garnsey v. Rhodes, 138 N. Y. 461, 34 N. E. Rep. 199; Bank v. Fordyce, 9 Pa. St. 275; Jackson v. Litch, 62 Pa. St. 451.

[10] Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311; La Beau v. People, 34 N. Y. 223; Real v. People, 42 N. Y. 270; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; Mowbray v. Gould, 71 N. Y. Supp. 365; State v. Pfefferle, 36 Kan. 90, 12 Pac. Rep. 406; Sturgis v. Robbins, 62 Me. 289; Smith v. State, 64 Md. 25, 20 Atl. Rep. 1026, 54 Am. Rep. 752; Com. v. Sackett, 22 Pick. 394; Com. v. Shaw, 4 Cush. 593, 50 Am. Dec. 813; Miller v. Smith, 112 Mass. 470; Wilbur v. Flood, 16 Mich. 40; Helwig v. Lacowski, 82 Mich. 619, 46 N. W. Rep. 1033; Ephland v. Ry. Co., 57 Mo. App. 147, 162; Gutterson v. Morse, 58 N. H. 165; Free v. Buckingham, 59 N. H. 219, 225; Wroe v. State, 20 Ohio St. 460, 469; Hanoff v. State, 37 Ohio St. 178.

[11] Com. v. Sackett, 22 Pick. 394; Com. v. Shaw, 4 Cush. 593, 50 Am. Dec. 813; Com. v. Mason, 105 Mass. 163; Miller v. Smith, 112 Mass. 470, 476; Com. v. Lyden, 113 Mass. 452; People v. Wells, 100 Cal. 459, 34 Pac. Rep. 1078; Wallace v. State, 41 Fla. 547, 26 So. Rep. 713, approved in Squires v. State, 42 Fla. —, 27 So. Rep. 864; South Bend v. Hardy, 98 Ind. 377, 49 Am. Rep. 792, 798; Player v. Ry. Co., 62 Iowa, 723, 16 N. W. Rep. 347; State v. Pfefferle, 36 Kan. 90, 12 Pac. Rep. 406; People v. Cahoon, 88 Mich. 456, 50 N. W. Rep. 384; State v. Bilansky, 3 Minn. 246; Dunn v. Aultman, 50 Mo. App. 231; Goins v. Moberly, 127 Mo. 116, 29 S. W. Rep. 985; Elliott v. State, 34 Neb. 48, 51 N. W. Rep. 315; Leo v. State, 63 Neb. — 89 N. W. Rep. 303; Great W. T. Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311; La Beau v. People, 34 N. Y. 223; People v. Oyer and Term. Court, 83 N. Y. 436, 460; Langley v. Wadsworth, 99 N. Y. 63, 1 N. E. Rep. 106; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 790; Wroe v. State, 20 Ohio St. 460; Jackson v. Litch, 62 Pa. St. 451; State v. May, 33 S. Car. 39, 11 S. E. Rep. 440; Brooken v. State, 26 Tex. App. 121, 9 S. W. Rep. 735. Mowbray v. Gould, 71 N. Y. Supp. 365, is an interesting illustrative case wherein it was held that the trial court was guilty of an abuse of discretion in compelling certain degrading questions to be answered. People v. Carr, 64 Mich. 702, 31 N. W. Rep. 590, and Buel v. State, 104 Wis. 132, 80 N. W. Rep. 78, are the same nature. Elliott v. State, 34 Neb. 48, 51 N. W. Rep. 315; Leo v. State, 63 Neb. —, 89 N. W. Rep 303, and People v. Cahoon, 88 Mich. 456, 50 N. W Rep. 384, are excellent illustrations of error in merely allowing the questions to be put. In each case the court held that there was prejudicial error, although the questions were successfully objected to. On the other hand, in Taylor v. State, 118 Mo. 153, 22 S. W. Rep. 806, the supreme court held the trial court was guilty of an abuse of discretion in not permitting disgrace to be shown. "Counsel for defendant," says the court, "in the cross-examination of the state's witness, Miller, asked this question: 'After this thing occurred were you not arrested for stealing billiard balls from Boulanger's saloon, and sent to jail?' On the objection of the prosecuting attorney, the court

cessities of justice.[12] Where, however, it is manifest to the court that such questions are not asked for the honest purpose of testing his credibility, but merely for the purpose of degrading, humiliating, or causing a prejudice against him in the minds of the jury, the court should promptly exclude them without waiting for an objection.[13] So, also, impertinent inquiries, calculated and intended to test the witness's power of self-control, and, if possible, to throw him off his guard, are not proper and should be excluded,[14] unless there been something very marked and suspicious in his conduct which causes the court, in the exercise of a sound discretion, to think them justifiable. A witness is entitled to protection from insult and contumely. The only question of discretion, in the matter in hand, is whether these questions can be asked for the honest purpose of discrediting the witness, *i. e.*, whether or not under the circumstances of the particular case the trial court will, as material to a proper determination of the issue raised by the pleadings, let the collateral question of the past life of the witness be developed by evidence material to that question, and if so, to what extent.[15] If the past life of the witness is sought to be developed, not for discrediting purposes only, but because it is also material to the issue joined, it does not, in a proper sense, raise a question of discretion. If it is material to the issue joined by the pleadings, although it is degrading and as such affects credit, an answer may be demanded as a matter of right[16] and it may be used for both purposes. Whilst I think the above is a correct exposition of this question the greatly divergent views of eminent jurists in treatises, judges in *dicta*, and courts in decisions as to whether or not a witness can be compelled to disclose his own disgrace, when the same will tend to affect credit, over a claim of privilege asserted by him, necessitates a more extended and detailed treatment.

Same Subject.—The mooted question may be put in this form: Has the witness an absolute privilege to be protected from disclosing his own disgrace, or is it a qualified privilege resting in the discretion of the court? If the latter, a refusal to answer when commanded so to do by the court is contempt, for which he may be punished, and the answer eventually compelled; if the former, he will be relieved by the superior court from any coercive measures the trial court may take, if he claims and insists upon his rights.[17]

Same Subject.—Much of the confusion has arisen by reason of the fact that the distinctions existing between a mere privilege of the witness and a right of the party have not been kept in mind. The privilege of the witness is no concern of the party, nor is the right of the party any concern of the witness. Each must look to his own interests, nor has the one any cause to complain of a waiver thereof by the other. The two following propositions may be laid down as the law.

First, when the question is relevant, material, and competent as to a point in issue raised by the pleadings, there is no discretion in the matter,—the party has the right to put the question and demand an answer,[18] there being no modern authority for any privilege to the witness in such case, even though it be degrading, unless it be also incriminating.

Second, when a question, degrading in its character, is irrelevant and immaterial to the issue joined or to credit, (a) the court may exclude of its own motion,[19] for the state has an interest that her citizens shall not be needlessly besmirched, nor the time of the court consumed in this way; (b) or the party may successfully object,[20] for two reasons, the one is that the minds

ruled the witness need not answer. The defendant was entitled to have the question answered. The evident purport of the interrogatory was to discredit the witness."

[12] See the interesting discussion in Great W. T. Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311.

[13] La Beau v. People, 34 N. Y. 223; Real v. People, 42 N. Y. 270; State v. Greenburg, 59 Kan. 404, 53 Pac. Rep. 61; Terr v. Chavez, 8 N. M. 528, 45 Pac. Rep. 1107; Crawford v. Christian, 102 Wis. 51, 78 N. W. Rep. 406; Rex v. Lewis, 4 Esp. 226.

[14] Mowbray v. Gould, 71 N. Y. Supp. 365; People v. Durrant, 116 Cal. 179, 48 Pac. Rep. 75, 83; Toledo, etc., Ry. Co. v. Williams, 77 Ill. 354; South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792; People v. Carr, 64 Mich. 702, 31 N. W. Rep. 590; Clink v. Gunn, 90 Mich. 135, 51 N. W. Rep. 193; People v. McArron, 121 Mich. 1, 79 N. W. Rep. 944, 956; Buel v. State, 104 Wis. 132, 80 N. W. Rep. 78.

[15] Of course, it is only where the question calls for an answer that will have a tendency to impair the witness' credit that the discretion exists to admit the testimony. South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792; Great W. T. Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311; Shepard v. Parker, 36 N. Y. 517.

[16] There is no better discussion of this than in Com. v. Gray, 129 Mass. 474.

[17] In *Ex parte* Boscowitz, 84 Ala. 463, 4 So. Rep. 279, a witness who had been committed for not answering a question he was privileged from answering was discharged by the supreme court. It is true the court held there was an absolute privilege for the reason that the question seemed to call for criminating matter, but if the privilege exists the cause therefor makes no difference as to the remedy for its invasion.

[18] Com. v. Gray, 129 Mass. 474; Brown v. Walker, 161 U. S. 591, 598, 605.

[19] Great W. T. Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311; Brandon v. People, 42 N. Y. 265; South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792; Sodusky v. McGee, 5 J. J. Marsh. 621; Ring v. Jamison, 2 Mo. App. 584, 591; Rex v. Lewis, 4 Esp. 226.

[20] Sharron v. Sharron, 79 Cal. 674, 22 Pac. Rep. 26, 38; South Bend v. Hardy, 98 Ind. 577, 583, 49 Am. Rep. 792; Leo v. State (Neb.), 89 N. W. Rep. 303; Great W. T. Co. v. Loomis, 32 N. Y. 127, 138, 88 Am. Dec. 311; People v. Crapo, 76 N. Y. 288; La Beau v. People, 34 N. Y. 223, 230; Hirschman v. Cohn, 56 N. Y. Supp. 602; State v. Huff, 11 Nev. 17; State v. Haab, 105 La. 230, 29 So. Rep. 725.

of the jurors shall not be confused by such a course, and the other that a wrongful prejudice shall not thus be engendered against his instruments of evidence; (c) or the witness may successfully decline to answer,[21] for the reason that he has the right not to thus be put upon the rack when no good or proper purpose is to be subserved thereby.

But when the question is relevant and material for the purpose of detracting from the credibility of the witness, but for no other purpose, by calling for an answer that will degrade him, there are three conflicting views. The first is: The question may be put, but the witness has the absolute privilege,[22] though the party has not, to decline to answer,[23] on the ground that it "shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace himself." The second is: The litigant may successfully interpose an objection.[24] The third is:

[21] See cases cited, *supra* (to notes 4 and 5, page 5).

[22] Taylor v. State, 83 Ga. 647, 10 S. E. Rep. 442; Morgan v. State, 688 Ala. 223, 6 So. Rep. 761; Lowery v. State, 98 Ala. 45. 13 So. Rep. 498 (but see *ex parte* Boscowitz, 84 Ala. 463, 4 So. Rep. 279, 5 Am. St. Rep. 384); Clark v. Reese, 35 Cal. 89; People v. Reinhart, 39 Cal. 449 (controlled by the Code which provides that a witness can not be compelled to answer a degrading question unless it is material to the point in issue); Pyle v. Piercy, 122 Cal. 383, 55 Pac. Rep. 141; State v. Ward, 49 Conn. 429, 433. 442; Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. Rep. 331; State v. Houx, 109 Mo. 654, 663, 19 S. W. Rep. 35; State v. Gesell, 124 Mo. 531, 27 S. W. Rep. 1101; State v. Black, 15 Mont. 143, 38 Pac. Rep. 674 (Code is same as California); State v. Huff, 11 Nev. 17; Vaughan v. Perrine, 3 N. J. L. 728; Roop v. State, 58 N. J. L. 479, 34 Atl. Rep. 749; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340; People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; State v. Blakely, 4 Park. Cr. Rep. 176; *In re* Lewis, 39 How. Prac. 155; Coble v. State, 31 Ohio St. 100; Galbreath's Lessee v. Eichelberger, 3 Yeates, 515; Elliott v. Boyles, 31 Pa. St. 65; Kolb v. Union Ry. Co., 23 R. I. —, 49 Atl. Rep. 392; 54 L. R. A. 646 (but see State v. Ellwood, 17 R. I. 763, 24 Atl. Rep. 782, 784); State v. Merriman, 34 S. Car. 16, 12 S. E. Rep. 619, 626; People v. Larsen, 10 Utah, 143, 37 Pac. Rep. 258 (Code is same as California); Kirschner v. State, 9 Wis. 140; Ingalls v. State, 48 Wis. 647, 4 N. W. Rep. 785, 791; Emery v. State, 101 Wis. 627, 78 N. W. Rep. 145, 152; Crawford Christian, 102 Wis. 51, 78 N. W. Rep. 406. In Buel v. State, 104 Wis. 132, 80 N. W. Rep. 78, it seems to be placed in the discretion of the trial court. The following cases contain *dicta* of like import. People v. Mather, 4 Wend. 229, 250, 21 Am. Dec. 122, 139; Newcomb v. Griswold, 24 N. Y. 298; People v. Herrick, 13 John. 82, 7 Am. Dec. 364; Rexford v. Southard, 6 Cow. 255; People v. Lambert, 9 Cow. 577, 625, Judge Cowan's note; Brandon v. People, 42 N. Y. 265, 267, People v. Priori, 164 N. Y. 459, 58 N. E. Rep. 668; South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792; State v. Murphy, 45 La. Ann. 959, 13 So. Rep. 229; State v. Alexis, 45 La. Ann. 973, 13 So. Rep. 394 (but see State v. Haab, 105 La. 230, 29 So. Rep. 725); Inat v. Browning, 4 Conn. 408, 418; Fries v. Brugler 12 N. J. L. 79, 21 Am. Dec. 52; Rusling v. Bray, 37 N. J. Eq. 174; Wroe v. State, 20 Ohio St. 460; Hanoff v. State, 37 Ohio St. 181, 41 Am. Rep. 496; State v. Bacon, 13 Oreg. 143, 9 Pac. Rep. 393, 399, 57 Am. Rep. 8, 16; Friend's Case, 13 How. St. Tr. 17; Cook's Case, 13 How. St. Tr. 334; R. v. O'Coigley, 26 How. St. Tr. 1351; MacBride v. MacBride, 4 Esp. 242. See also the decision of Justice Brown, in Brown v. Walker 161 U. S. 591, 598, 605.

[23] That it is personal in degrading matters see, Clark v. Reese, 35 Cal. 89, 95, approved in Sharron v. Sharron, 79 Cal. 674, 22 Pac. Rep. 26, 38. Treat v. Browning, 4 Cush. 408, 418; State v. Ward, 49 Conn. 429; Taylor v. State, 83 Ga. 647, 10 S. E. Rep. 442; Sodusky v. McGee, 5 J. J. Marsh. 621; Hill v. State, 42 Neb. 503, 60 N. W. Rep. 916; Freis v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 52; People v. Blakely, 4 Parker Cr. Rep. 176, 184; Great W. T. Co. v. Loomis, 32 N. Y. 127, 138, 88 Am. Dec. 311; Brandon v. People, 42 N. Y. 265; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; State v. Patterson, 2 Ired. (N. Car.) 346, 358; Territory v. O'Hara, 1 N. D. 30, 44 N. W. Rep. 1003; Elliott v. Boyles, 31 Pa. St. 65; People v. Larsen, 10 Utah, 143, 37 Pac. Rep. 258; Ingalls v. State, 48 Wis. 647, 4 N. W. Rep. 785, 791; Smith v. State, 64 Md. 25, 20 Atl. Rep. 1026, 54 Am. Rep. 752. As to incriminating see, Pleasant v. State, 13 Ark. 360, 378; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. Rep. 698; Williams v. Dickenson, 28 Fla. 90, 9 So. Rep. 847, 851; South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792, State v. Van Winkle, 80 Iowa, 15, 45 N. W. Rep. 388; Clifton v. Granger, 86 Iowa, 573, 53 N. W. Rep. 316; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; Commonwealth v. Shaw, 4 Cush. 594, 50 Am. Dec. 815; Commonwealth v. Gould, 158 Mass. 499, 33 N. E. Rep. 656; State v. Belansky, 3 Minn. 246; State v. Kennedy, 154 Mo. 268, 55 S. W. Rep. 293; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; Ward v. People, 6 Hill 144; People v. Priori, 164 N. Y. 459, 58 N. E. Rep. 668; People v. Teague, 106 N. Car. 576, 11 S. E. Rep. 665, 679; State v. Wharton, 85 Tenn. 449, 3 S. W. Rep. 490; Day v. State, 27 Tex. App. 143, 11 S. W. Rep. 36; Brown v. State (Tex.), 20 S. W. Rep. 924; Chamberlain v. Wilson, 12 Vt. 491, 36 Am. Rep. 356; State v. Coella, 3 Wash. St. 99, 28 Pac. Rep. 28; Roddy v. Finnegan, 43 Md. 490, 502. But whether the privilege is for the one or the other is a matter of indifference so far as the present question is concerned. It has been held, however, that where in a criminal case a defendant is a witness in his own behalf, the privilege may be claimed by the defendant's counsel. Blum v. State, 94 Md. 375, 51 Atl. Rep. 26. Compare with case that of State v. Wentworth, and People v. Larsen, *supra*.

[24] Cliffton v. Granger, 86 Iowa, 573, 53 N. W. Rep. 316; State v. Gesell, 124 Mo. 531, 27 S. W. Rep. 1101; People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183; State v. Rozum, 8 N. D. 548, 80 N. W. Rep. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. Rep. 482; Asher v. Ter., 7 Okla. 188, 54 Pac. Rep. 445; Hyde v. Ter., 8 Okla. 69, 56 Pac. Rep. 851; Carroll v. State, 32 Tex. Cr. Rep. 431, 24 S. W. Rep. 100, 38 Cent L. J. 146; McCray v. State, 38 Tex. Cr. Rep. 669, 44 S. W. Rep. 170; Whitley v. State (Tex.), 56 S. W. Rep. 69; Tla-kooyel-lee v. U. S., 167 U. S. 274; Plinsky v. Germania, etc., Co., 32 Fed. Rep. 47; State v. Fornier, 68 Vt. 262, 35 Atl. Rep. 178; Cundell v. Pratt, 1 M. & M. 108; Frost v. Holloway (not reported); Parkhurst v. Lowten, 1 Swans. 194, 216—dictum of Lord Eldon; R. v. Orton, Tr. of Orton, Vol. 2, p. 719 (cited with a statement of the question asked and answer called for

The witness has no such privilege, unless the answer would tend to incriminate him; nor has the litigant a right to object, and the court may, if in its discretion such course seems in the furtherance of justice and truth, compel an answer.[25] A somewhat careful review of the authorities will now be had in order to ascertain whether the first or third view is supported by the better reasons—the second may be cast aside as unquestionably unsound, although carelessly recognized in many cases.

English Authorities — Cases.—The authority uniformly cited by all of the older cases and text-writers to support the view that there was a privilege is the noted *dictum* of Lord Chief Justice Treby in Cook's case:[26] "You may ask upon the *voir dire* whether he has any interest in the cause; * * * but that you can ask a juror or witness every question, that will not make him criminous, that is too large: men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petit larceny; but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal or subject them to punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty, his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace himself." The sole question before the court was whether a juror on his *voir dire* could be asked, to affect competency, if he had not formed an opinion and expressed the same to the effect that the defendant was guilty and would be hanged. This is a very different question from the cross-examination of a witness to affect credit. In so far as the quotation is not *dictum*, it is no longer the law, for it is now almost universally recognized as the correct practice to put to the juror the question in this form: Have you formed or expressed an opinion as to the guilt or innocence of the accused? This is exactly what the court held could not be done.

On the other hand a number of cases decide, or contain *dicta*, that such questions are proper, and an answer may be compelled.[27] Thus, in Frost v. Holloway, Lord Ellenborough compelled a witness, over his claim of privilege, to answer whether he had not been confined in jail for theft. In Cundell v. Pratt, Best, C. J., interfered to prohibit a question asked on cross-examination, the answer to which would have tended to degrade the witness, but he did so solely on the ground that it would also have tended to incriminate her. He said he did not forbid the question on the ground that it would tend to degrade her. "I, for one, will never go that length. Until I am told by the house of lords that I am wrong, the rule that I shall always act upon is, to protect witnesses from questions, the answers to which, may expose them to punishment. If they are

in Muller v. Hosp. Assn., 5 Mo. App. 390, 402. Cited also as R. v. Castro). Special attention is called to the following cases for the reason that reversals were ordered because the witness was not compelled (the witnesses did not claim privilege in most of them, the counsel objected, but this distinction was not considered in the opinions) to answer degrading questions. Zanone v. State, McCampbell v. McCampbell, Bedgood v. State, People v. Turney, State v. Taylor, State v. Miller, Tla-koo-yel-lee v. U. S. In a late case in Kentucky, Howard v. Commonwealth, 61 S. W. Rep. 756, 759, the court has cast some doubt upon the question whether that state can now be classed amongst those that leave the matter to the discretion of the trial court. See also the dissenting opinion of Judge Hobson on page 762.

[25] Zanone v. State, 97 Tenn., 101, 36 S. W. Rep. 711, 35 L. R. A. 556; Burdette v. Com., 93 Ky. 76, 18 S. W. Rep. 1011; McCampbell v. McCampbell, 103 Ky. 745, 46 S. W. Rep. 18; Roberts v. Com. (Ky.), 20 S. W. Rep. 267; Pleasant v. State, 13 Ark. 360, 378; Hollinsworth v. State, 53 Ark. 387, 14 S. W. Rep. 41; Holder v. State, 58 Ark. 478, 25 S. W. Rep. 279; Wallace v. State, 41 Fla. 547, 26 So. Rep. 713; Squires v. State, 42 Fla. 251, 27 So. Rep. 864; Bedgood v. State, 115 Ind. 275, 17 N. E. Rep. 621; State v. Pfefferle, 36 Kan. 90, 12 Pac. Rep. 406; State v. Probasco, 46 Kan. 310, 26 Pac. Rep. 749; State v. Greenburg, 59 Kan. 404, 53 Pac. Rep. 61; State v. Haab, 105 La. 230, 29 So. Rep. 725; McLaughlin v. Mencke, 80 Md. 83, 30 Atl. Rep. 603; Commonwealth v. Savory, 10 Cush. 535; Gould v. Commonwealth, 158 Mass. 499, 33 N. E. Rep. 656; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Clemens v. Conrad, 19 Mich. 170; Helwig v. Lacowski, 82 Mich. 619, 46 N. W. Rep. 1033; People v. Harrison, 93 Mich. 594, 53 N. W. Rep. 725; People v. McArron, 121 Mich. 1, 79 N. W. Rep. 944, 956; People v. Turney, 124 Mich. 542, 83 N. W. Rep. 273; People v. Higgins, 127 Mich. 291, 86 N. W. Rep. 812; State v. Belansky, 3 Minn. 246; State v. McCarty, 17 Minn. 76; Muller v. St. L. Hosp. Assn., 5 Mo. App. 390, affirmed in 73 Mo. 242; State v. Miller, 100 Mo. 606, 621, 13 S. W. Rep. 832; State v. Taylor, 118 Mo. 153, 22 S. W. Rep. 806; State v. Pratt, 121 Mo. 566, 26 S. W. Rep. 556; Goins v. Moberly, 127 Mo. 116, 29 S. W. Rep. 985; Hill v. State, 42 Neb. 503, 60 N. W. Rep. 916; State v. Staples, 47 N. H. 113, 90 Am. Dec. 565; Gutterson v. Morse, 58 N. H. 165; Lesser v. Furniture Co., 68 N. H. 343, 44 Atl. Rep. 490; Borrego v. Ter., 8 N. M. 446, 46 Pac. Rep. 349, 358; Terr. v. Chavez, 8 N. M. 528, 45 Pac. Rep. 1107; Shepard v. Parker, 36 N. Y. 517; Real v. People, 42 N. Y. 270; People v. Irving, 95 N. Y. 541; Spiegel v. Hays, 118 N. Y. 661, 21 N. E. Rep. 1105; State v. Patterson, 2 Ired. (N. Car. Law) 346, 38 Am. Dec. 699; United States v. Wood, 4 Dak. 455, 33 N. W. Rep. 59; State v. O'Hara, 1 N. D. 30, 44 N. W. Rep. 1003; State v. Pancoast, 5 N. D. 514, 67 N. W. Rep. 1052, 35 L. R. A. 518, full note.

[26] 13 How. St. Tr. 334. See also the following cases, of like import: Layer's Case, 16 How. St. Tr. 101; R. v. Lewis, 4 Esp. C. 225; O'Coigley's Case, 26 How. St. Tr. 1351; The King v. Inhabitants of Castell Careinion, 8 East, 77; Dodd v. Norris, 3 Camp. 519.

[27] MacBride v. MacBride, 4 Esp. C. 242; Harris v. Tippett, 2 Camp. 637; Yewin's Case, 2 Camp. 638; King v. Edwards, 4 Durn. & East. 440; Frost v. Holloway, by Lord Ellenborough, unreported; Cundell v. Pratt, M. & M. 108, 22 E. C. L. R.; Roberts v. Allatt, M. & M. 192.

protected beyond this, many an innocent man would unjustly suffer."

English Treatises.—In Phillips on Evidence[28] it is said: "There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been divided * * * several opinions have been pronounced by judges of great authority, from which it may be collected, that the witness is not compellable to answer such questions." Here Cook's case and others are commented on. "On the other hand, there are many cases in which questions of this description have been allowed by the court." Here the cases of Cundell v. Pratt and others are commented on. Stephens, Nisi Prius[29] says: "Seemingly there is no express decision that a witness is compelled to answer questions degrading to his character; but authorities exist that the witness is not compellable to answer such questions." Saunders says:[30] "How far a witness may be examined as to questions tending to disgrace or degrade, may, in some measure, depend on circumstances." Roscoe says:[31] "A witness is not compellable to answer questions put for the purpose of degrading his character;[32] though such questions may be legally asked."[33] Stephens says:[34] "Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify."

Mr. Best,[35] after calling attention to the Act of 1854 which provided that a witness might be asked if he had been convicted of a felony or misdemeanor, and if he either denied it or refused to answer, the questioner might prove it, says: "These enactments leave the doubt unsolved with regard to questions not named therein, *e. g.*, whether the witness has ever been guilty of a dishonorable act. The better opinion seems to be, that such questions may be put, and must, if the presiding judge require, but not otherwise, be answered, as was shown by Reg. v. Castro,[36] where a witness for the prosecution, on a charge of perjury, was compelled to admit 'that he had many years before committed adultery with the wife of an intimate friend.'" Mr. Taylor[37] very strongly urges the necessity of such compulsion. He says: "It seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties to the cause." Mr. Starkie,[38] the greatest of all English writers on Evidence, after reviewing the authorities, says: "The great question, therefore, whether a witness is bound to answer a question to his own disgrace, has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principle of which consists in a knowledge of the source or depositary from which such testimony is derived; the whole question resolves itself into one of policy and convenience; that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the offense to the private feelings of the witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury as he is. As to the other consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain. The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial, and it may be added, but theoretical."

Before leaving the English authorities it may be well to remark that there is a vast difference between appellate courts, in matters of this kind, and *nisi prius* courts. It it always to be borne in mind that on appeal the discretion of the trial court, and this is a matter of discretion, will be interfered with only for manifest abuse. Hence the appellate court may approve of the exercise

[28] 2 Phil. on Ev., Cow. & Hill's notes, p. 421 *et seq.*

[29] Stephens' Nisi Prius, p. 1789.

[30] Saunders, Plead. & Ev., 4 Am. Ed. 954.

[31] Roscoe's Nisi Prius Ev. 175.

[32] Citing Cook's Case, Friend's Case and Layer's Case.

[33] Citing R. v. Edwards, 4 Durn. & East, 440.

[34] Chase's Stephen's Digest of Evidence, art. 129. It is respectfully submitted that the court has no such discretion. When the question is neither material to the issue nor to the credit, the court should exclude of its own motion, and if it does not, either the party may object or the witness decline to answer for reasons given heretofore.

[35] Best on Evidence, Inter. Ed. 9 (Chamberlayne's), sec. 130.

[36] Trial of R. v. Castro, vol. 2, p. 719. This is the celebrated trial of the pretended Sir Roger Tichborne. Also cited as R. v. Orton.

[37] Taylor on Evidence, 1461.

[38] Starkie on Evidence, 10 Am. Ed. 210.

of a discretion in a way the appellate judges would not have exercised it had they been the *nisi prius* court. During the trial the *nisi prius* jurdge must exercise a discretion as to many things, and in nothing is his discretionary actions called for more frequently than in matters touching the extent of the cross-examination to affect credit. All of the English cases are *nisi prius*. Nearly all of the American are appellate. Had this distinction been kept in mind much of the uncertainty and confusion enshrouding this matter would not have existed; nor would *nisi prius* judges who decided the question differently, but correctly, at different times, have been so misunderstood and misconceived. To illustrate: Mr. Taylor, at section 1460, in treating of this question, says of Lord Ellenborough, designated by both Phillips and Roscoe as that great master of the law of evidence. "Even he seems, in a later case, to have disregarded the rule enunciated by himself." As a matter of fact in the three cases cited by Mr. Taylor to establish this conflict, Lord Ellenborough acted as a *nisi prius* judge, and the cases are but apt illustrations of how "a master of the law of evidence" should and would exercise his discretion under varying circumstances. In R. v. Lewis[39] upon the prosecutor being asked, upon cross-examination, if he had not been confined in the house of correction, he at once interposed with his discretionary power and prohibited the question—doubtless upon the theory that the time of the court should not be consumed by questions that he thought, under the circumstances of the case, could answer no proper purpose. In Millman v. Tucker[40] upon Lord Erskine asking a witness if he had not been convicted of forging coalmeters certificates, he gave permission to the witness to answer the question if he felt so disposed, but advised him not to do so. In this case he felt it was not essential to justice that the question should be answered, yet it was a proper question, and left the option with the witness. In the other case, Frost v. Holloway[41] the bearing of the witness was doubtless such that he was convinced a broad scope should be allowed the cross-examiner, hence he permitted the question to be asked the witness if he had not been tried for theft at Reading, and upon his refusal to answer said: "If you do not answer the question I will commit you;" adding "you shall not be compelled to say whether you were guilty or not."[42]

[TO BE CONTINUED.]

JAMES A. YANTIS,
University of Missouri.

[39] 4 Esp. 226.
[40] 2 Peak N. P. C. 222.
[41] Not reported.
[42] See the interesting discussion of Lord Ellenborough's actions in these cases in Phillipp's Ev., pages 425 428, and in Great W. T. Co. v. Loomis, 32 N. Y. 127, 134, 88 Am. Dec. 311.

LOTTERIES—KNIFE RACKS.

McREA v. STATE.

Court of Criminal Appeals of Texas, June 24, 1904.

A knife rack operated by defendant, consisting of an inclined table, with knives stuck therein, and so arranged that rings could be thrown on them, which rings defendant sold to customers who endeavored to ring the knives on the table, they being entitled to any knives rung, or on which the rings caught, did not constitute a lottery.

DAVIDSON, P. J.: The information charges appellant with establishing a lottery and disposing of personal property by means thereof "under the name and upon the pretense of running and operating a knife rack." The evidence discloses that it was an ordinary knife rack, which consisted of a sloping board with knives stuck in the board and arranged so that rings could be thrown and lodged upon the knives, and when the player was fortunate enough to throw one of these rings around a knife, or catch it on a knife, the knife became his property. These knives were, in the main, of a cheap sort, and the rings were sold at a nominal sum—72 for one dollar, 3 rings for 5 cents, 7 for 10 cents, and 18 for 25 cents. This offense does not come within the definition of lotteries defined by our statute, nor of any other definition of lottery of which we are aware. A lottery is commonly understood as a "scheme for the distribution of prizes by lot or chance especially a gaming scheme in which one or more tickets bearing particular numbers draw prizes and the rest of the tickets are blank." There were no tickets distributed under the scheme, as shown in the testimony, but rings were sold, and the thrower of the rings took chances as to whether he could inclose one of the knives by one of the rings so thrown, and the success of the pitcher depended upon his practice, experience, or skill. We do not believe it was a lottery. However, the facts stated do not show a violation of the law. By the act of the First Special Session of the Twenty-Fifth Legislature (Laws 1897, p. 51, ch. 18) a tax was levied upon this character of knife rack in the following language: "Sub. 16. From every person or firm keeping a knife, cane or doll rack, or any other device upon which rings are pitched, or at which balls are thrown, an annual tax of $25.00." The state, therefore, has imposed a tax and required a license for the running of knife racks such as the one in question, and this eliminates such from the category of offenses. The legislature cannot authorize the doing of a thing, and require a tax or license for doing it, and at the same time punish the act or thing so taxed. This case does not come within the act of the Twenty-Seventh Legislature, p. 267, ch. 103.

The judgment is reversed, and the prosecution ordered dismissed.

NOTE.—*What Mechanical Devices Constitute Lotteries.*—Mechanical devices for obtaining anything of value by chance are most generally referred to as falling within the statute prohibiting or regulating gambling transactions. Nevertheless, many of these devices come within the inhibition of the statutes against lotteries.

Slot Machines.—What are known as "nickel-in-the-slot" machines, constitute lotteries as well as gambling devices. Prendergast v. State, 41 Tex. Cr. Rep. 358, 57 S. W. Rep. 850. In this case a nickel-in-the-slot machine was so contrived, that if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times he would lose. The court held that such a device constituted a lottery, although it might also constitute a gambling device for which the keeper thereof would be liable in damages. See also Loiseau v. State, 114 Ala. 34, 62 Am. St. Rep. 84; Kolshorn v. State, 97 Ga. 343; New Orleans v. Collins, 52 La. Ann. 973.

Keno.—It has been held that the game called "keno," although a game decided by lot or chance, was not a lottery within the act of the state of Alabama, which in the attempt to regulate "lotteries" permitted the "commissioner of lotteries" to license certain lotteries. But the game "keno" was particularly prohibited under the statute of gambling, and the court held that the commissioner could not, by construing the game of keno to be a lottery, license its indulgence when the statute on gambling expressly prohibited it. See also United States v. Hornibrook, 2 Dillon (U. S.), 329.

Wheels, Disks and Cheap John Boards.—The spinning of a wheel or disk has long been a favorite means of the determination of a question by chance, and has been held generally to be a lottery. Chavannah v. State, 49 Ala. 396. In this case a wheel was revolved on a pivot, or axis, having a fixed index attached to it, which, when the wheel stopped, pointed to one of the figures on its face, corresponding with other figures on cards, checks, or "paddles," which were sold to the players before each revolution of the wheel; the holder of the check, or "paddle," which had on it the number corresponding with that to which the index points where the wheel stops, winning a greater sum than the price paid for it, and the others losing. The court said of this device: "Such a performance, when a small sum of money is ventured for the chance of obtaining a greater sum, is the carrying on a lottery. And so one of the witnesses on the trial below called it. It may be somewhat nondescript, and may not yet have received a name by which it can be definitely registered in the catalogue of games; yet it has all the essentials of a lottery."

A later case in Alabama distinguishes between a wheel device by which numbers are "sold," and which therefore constitutes a lottery, and a wheel on which several parties place money, and the winner takes the whole board. The latter is considered a gambling device pure and simple, and not a lottery. Buckalew v. State, 62 Ala. 334. The court said: "In a lottery chances are purchased, generally by the purchase of tickets, or fractions of a ticket. Not necessary, however, that tickets should be issued. Wherever chances are sold, and the distinction of prizes determined by lot, this, it would seem, is a lottery. * * * According to the testimony in the present record, it cannot, with any propriety, be said that chances were sold, or prizes won or drawn. The entire theory of the game was, that several, or many persons contributed equal sums to a common purse which was awarded to the contributor whom chance so favored, as to register for him the highest number. In its result, it resembles what is known in horse-race parlance as sweep-stakes. We do not think the proof established a case of lottery."

In a still later case in Alabama the court narrowed the distinction already noted by holding that if different articles of jewelry are placed on the disk, and the player was entitled to that piece of jewelry which was on the place opposite the number at which the arrow stopped after being spun by him, such method of procedure supplied all the essentials of a lottery. Reeves v. State, 105 Ala. 120. To same effect: Barry v. State, 39 Tex. Cr. Rep. 240.

Dice.—The throwing of dice constitutes a lottery. Fleming v. Bills, 3 Oreg. 286. In this case defendants conducted a scheme operated by means of dice and a box containing prizes. The box was divided into compartments; these compartments were numbered from eight to forty-eight inclusive. Some of these compartments contained prizes; others were empty or blank. The game was played by means of eight dice thrown by the person who chose to pay the specified sum for the chance of winning a prize. If such person threw a number corresponding with the number of a compartment containing a prize, he became entitled to a prize contained in that compartment, otherwise he received nothing. The court said: "There is some reason to think that, if throwing the dice is an exhibition of skill, the circumstance is material—for it seems essential to constitute a lottery that the scheme should not be a game of skill. But is the throwing of dice in an honest manner an exhibition of skill? I think that the mode is selected on the theory that the result of a fair throw of the dice is wholly a matter of chance. Nor do I find any adjudication to the effect that a scheme is not a lottery, unless each holder of a chance, or all of them collectively, has a certainty that a prize or prizes will be gained by some one of their number."

Pak-Kap-Pio.—In our little possession of Hawaii there has been some difficulty in applying Anglo-Saxon ideas as to the propriety of games of chance to the customs of the Chinese residents. One of their famous games is Pak-Kap-Pio, or "Dove Lottery." In this game eighty numbers are pinned to a large screen. Each player marks off on the ticket he has purchased ten numbers on the screen which he thinks will win. These eighty numbers are then taken down mixed together indiscriminately and separated into groups of 20 and placed in four sealed jars. The players then remove one jar and the manager then selects one of the remaining three jars, which jar so selected contains the twenty winning numbers. The prizes are based on the number of winning numbers which a player has selected. Thus, if he picks out six of the winning numbers he receives $1.00; seven, $2.00; etc. It needs no argument to prove that such a game is a lottery, and it was so held by the Hawaiian court. King v. Yeong Ting, 6 Hawaii, 576; King v. Lum Hung, 7 Hawaii, 344.

Other devices similar to those here referred to, appearing from time to time, must be defined and characterized as lotteries or gambling devices, or both, according to the principles herein illustrated.

JETSAM AND FLOTSAM.

WILLS—THE MAN WHO DRAWS HIS OWN WILL

The most recent example of the lawyer's best friend—"the man who makes his own will"—has been found in the late Mr. Hanbury. His will has been before Kekewich, J., and the Court of Appeal (*In re* Hanbury; Hanbury v. Fisher, L. R. [1904], 1 Ch. 415). Kekewich, J., held that the testator had made an absolute gift of all his property to his widow, and the Court of Appeal has affirmed this decision. Cozens-Hardy, L. J., dissenting.

The gift in the will was in this form: The testator left the whole of his property to his wife "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." Now, while probably he never thought whether he was creating a trust binding in law on his wife or not—since it did not cross his mind that she would for a moment think of doing anything else than carry out his last wishes—still it seems clear that he intended to preserve the whole of his property for his nieces should they survive his wife. This is not sufficient to take away an absolute gift where it is clearly absolute. But where this is the case and the gift can be read as merely contingently absolute—the contingency here being the death of the nieces in the wife's lifetime—it is more in accordance with the testator's intention to read it so. There is no repugnancy, as Vaughan Williams, L. J., seems to think, in doing this. Legacies to women are constantly so construed where the gift is held to be absolute only if she has no children. This was the view taken by Cozens-Hardy, L. J., L. J., whose dissenting judgment, we may humbly say, seems to us more reasonable than any of those of the other two lords justices.—*The Law Magazine and Review, London.*

THE PASSING OF A TYPE.

"The old-time vitriolic lawyer, the picturesque character who stormed up and down the circuits, roaring at courts, juries and especially at witnesses, seems in these degenerate times to have given place to a successor who is almost effeminate in comparison," said ex-senator William H. Sears recently. "When I entered the practice thirty-one years ago, the late Judge John W. Henry, of Kansas City, was on the bench of the twenty-seventh, as this judicial circuit was then numbered. Around him was an array of Blackstonian disciples, brave as lions, and apparently equally as fierce in action. Out of court they were the most jolly, companionable men that ever clinked glasses across the board. Their examination of witnesses was a fight from start to finish. They prided themselves upon being 'severe.' They were quick and abrupt. They terrified the most self-possessed of witnesses. With finger poised like a rifle, face intense and rebuking, a lawyer would put the questions like a monk of the Inquisition. I cannot account for the theory unless it was to impress the spectators and reporters. As a rule, harsh conduct by a lawyer wins sympathy from the jury adversely to his cause. You will notice by an examination of verdicts that the case winners before juries are men of urbanity. I know an instance where a case was won by a lawyer's refusal to condemn a witness who had evidently perjured himself. 'Why in the mischief didn't you roast that fellow as he deserved?' demanded his associate counsel. 'You handled him as if you were afraid of him.' 'Didn't the examination convince you he was lying?' the mild lawyer asked. 'Yes, but why didn't you rub it in while you had him at your mercy?' 'Because the jurymen are the ones to fix the penalty. All I had to do was to establish his guilt.' Human nature is such that it responds instinctively to the fellow who is in misery and can't help himself. Lawyers have learned that it don't pay to crowd a victory too close, else the jury may come to the rescue of the victim. It's the cool-headed, courteous examiner that elicits the information necessary to his cause. By his politeness and consideration he wins from the witnesses on the other side damaging confessions, whereas a man who approaches them with sighted guns only drives them to cover. But the old-time lawyer, with his riotous ways, was a far more interesting personality than his oily successor. The people would pack the court-room to see him perform, and especially when the time came to 'argufy the case.' As a rule, there were no time restrictions on important cases, and he could talk as long as he liked. It seems to me there were more real orators then. The style of practice tended to develop eloquence. Men would study more over their speeches and employ lofty thoughts on patriotism and honor. Sometimes when it was reported that certain lawyers were going to speak men would travel a long distance to hear them, men who had no interest whatever in the result of the case and didn't know what it was about. The lawyers knew of these conditions and that is perhaps why they played so energetically to the galleries. 'The spirit of commercialism has laid hands on many cherished idols, but I wish it had left the old-time volcanic fire spouting lawyer alone.'"

REMINISCENCES OF CHARLES O'CONOR.

William H. Winter, the librarian of the New York Law Institute, in a recent annual report, takes occasion to record a few personal reminiscences of Charles O'Conor. He says:

"Nor can I forget the pleasant experiences and many talks of at least a dozen years—to the year of his death—with Mr. O'Conor. I have had him with me in the old Burton Theater building, he and I the only occupants of the library—the wintry storm beating fiercely without, the windows shaking in their frames and rattling by the sleet and hail—the old veteran, then nearly seventy years of age, the recognized great leader of the bar, not very well protected from the cold and chill of the cheerless room, sitting on the gallery floor silently at work by aid of the light of my borrowed kerosene lamp.

I watched him at work in that lonesome place and in those lonely hours with all the ceaseless curiosity of a young man—the one book in hand and seldom changed—the monotonous scratching of his pen—the pale, intellectual face buried in untiring thought—the black piercing eyes often seeming to possess chameleon-like power of changing color, now turning neither to the right, nor to the left—no rest, no pause, no variety—endless toil. No change of hand — no standing erect—no idle remark to kill monotony—no casual question to stifle strain—that man before me was so different, so very different from all other men. * * * I have my boyish thoughts and I have a boy's first view of the rough and weary path by which genius slowly forces its way to fame.

I watched him fascinated as is the traveler in Egypt by a moonlight glance at the famous sphinx—sphinx face indeed, covered all over with the battle lines and scars of a fifty years' contest, of fights to the finish with men like Daniel Lord, David Dudley Field, Wm. Curtis Noyes, James T. Brady and William M. Evarts. * * * Years upon years before I was born, this first of our great old men was famous. There he sat at such time and place—still toiling, still struggling to keep his fame.

As I watched the great white-souled lawyer, without earth's poison stains, except as he was annoyed or angered by personal contact with sycophants, with record as clean as a flake of snow from heaven—at his quiet prolonged toil in that old den, on such wintry night—him the acknowledged great leader of the American bar — white-haired, aged, wealthy, first victor in a profession in which to achieve even moderate success in his day required a greater combination of intellect and physique, inherited and acquired powers and virtues than all other professions and trades or occupations—the old time thoughts came back with a rush and with enforced biting sarcasm, and begging pardon of Brady embodied in his marble bust below, I said to myself — Mr. O'Conor, as much as I respect and honor you, I would not step into that life of thine of awful heart-breaking toil and strife—for all of O'Conor's well-earned wealth—for all of O'Conor's deathless fame.

When twelve o'clock midnight came, his silent work would cease and with smile and greeting, his pleasant talks began. He would tell me the story of our library portraits, his views of the notable characteristics of the New York bar leaders, men aged when he was young—as I remember them, when I was of your age, Mr. Winters — of Thomas Addis Emmet, of John Wells, of Ogden Hoffman and Aaron Burr. * * * He spoke pathetically of his early professional life, the bitter struggles, the long deferred success, of his boyhood life in New York as his father's newsboy, his intimate knowledge of the streets and people of old New York, his great love for this his native city, of his law-student days, his lack of books, the queer West Indian law preceptor and his military experience as his sergeant. * * * Willing to listen the nights all through, but conscience stricken that in my eagerness to hear him, I had selfishly and cruelly disregarded his station and years, I would persuade him at last to quit the place, to descend into the charnel-house-like cellar to reach the street, to brave with me the policeman's stare and surprised look, revealing private thoughts as to venerable years associated with unseemly hours, and to be guided by me through the wintry, storm-drenched streets to the cars."—*The Brief.*

LEGISLATION AGAINST USING THE FLAG FOR ADVERTISING PURPOSES.

A check has been put upon the rampant patriotism—more rampancy that patriotism—of those who regard the American flag, not as a symbol, but a fetish, to be worshipped with the ringing of bells and burning of incense. It appears to be the idea of these well meaning but loosely thinking persons that we have in this country a considerable element which is burning to deface the flag and wreak injurious expression upon it. We have little doubt that if the country were scraped with a fine tooth comb it would fail to bring any such persons to light, excepting, possibly a few foreign anarchists, who will insult any flag in the cellar anyway. And it is a comfort to listen to the plain sense of the supreme court in holding that pictures of the stars and stripes are neither illegal nor insulting.

The framers of the various state and federal bills which have for their object the shooting and imprisoning of all persons who do not visibly reverence our piece of bunting, as they are not required to reverence their God, appear to have strangely confused insult and industry. To their minds it is the same thing to raise an American flag over an American factory, to draw attention to the factory, or to make a picture of the flag on a label or sign, as it is to trample on our emblem and deface it with manure, as certain Cubans did the other day in Cienfuegos. The court advises these hot-headed persons that the laws they contemplate are unconstitutional, an interference with personal liberty, and an attempt at class legislation. The main thing is that they are absolutely unnecessary, and are a reflection on the real, though quiet love of country and respect for its institutions, that is possessed by the whole populace.

We have never believed that the originators of the flag laws were sincere when they affected to look with horror upon the pictures of the English and American flags, interwined, that appear on the advertisements of the ocean liners. The picturing is entirely proper, and savors of no disrespect whatsoever. We have not believed them sincere when they wanted to take down the golden eagle with flags in his talons that ornaments—yes, ornaments—a place of business in this city, because the flag was that of this country. The managers of the business have just as good a right to use their flag, as a marke of the protection and the beneficent influences under which that business has prospered, as the army and navy have to use it Things are at a pretty pass when lawmakers order the American public to desist from using its own flag.

One of the labor unions in Colorado recently paraded, trailing the Stars and Stripes in the dust, and jeering at the soldiers who should have protected it. It is not recorded that any serious action was taken against them, for one must revere the walking delegate, but it has been observed that there is hot feeling against the makers of a breakfast food for printing a picture of United States troops, on the march, with their flag aloft, as it ought to be. The idea that anyone's sensibility is disturbed by a picture of American soldiers marching under their own ensign, whether that picture is an advertisement or a cut in a daily paper, is simply preposterous. A piece of cloth has no consciousness and needs no law to protect it from injustice. When it is the emblem of a great people you may insult that people through it, but the people who accept it as their symbol are the last ones in the world to contemplate such an insult. This special legislation, forbidding certain Americans picturing their own flag, under pain of punishment for treason, is of a piece with the sanctifying of the executive and protecting him by laws not accorded to the citizens who elected him. The court is thanked for its plain words on a simple and silly proposition.—*Brooklyn, N. Y. Eagle.*

BOOKS RECEIVED.

The Earthly Pilgrimage of John Jay. By John Henry Zuever. A Tome of the Earthly Pilgrimages of the Chief Justices of the United States Supreme Court. The Associated Lawyers' Publishing Company Battle Creek, Michigan. 1904. Price $3.00. Review will follow.

CORRESPONDENCE.

SEVERAL LEGAL AND MATHEMATICAL QUESTIONS IN ONE PROPOSITION.

To the Editor of the Central Law Journal:

A purchased from B a city lot, 40x120 feet, described as lot 13, which he had B to convey to his, A's wife. A then purchased, and paid for it, eleven additional front feet from B, next west to this first purchase, running back 126 feet, and 6 feet on the south end, which B agreed to convey to A, but never did so. A and wife took immediate possession of both purchases, as their homestead, and have held it, and still in possession, for 25 years. B, without A's or wife's knowledge, long after the first deed was recorded, placed his second deed to A's wife upon record, conveying to her the same identical described land as contained in his first deed to her, excepting that it was shoved over 7 feet further west, upon the land he promised to convey to A, and which A also before that had purchased and paid for, and was in possession of, and then died. Lot 13, what A first purchased and had paid for, and no more, was assessed for taxes to A's wife, and was always known, and is now, as lot 13, and nothing else was ever assessed in her name. She became delinquent in the payment of her taxes, and that piece, 40x120 feet, and no more, known on the records as lot 13, was sold for taxes to C, who instituted an action to foreclose his tax certificate lien, described as lot 13, and more particularly in his petition, also as 40x120 feet. Defendants, both A and his wife who were jointly sued, answered jointly, and denied that lot 13 was more particularly described as 49x120 feet, but that it in reality consisted of a tract 51x126, covering all of A's several purchases, and also denied that said 51x126 feet as a whole, had ever been taxed to A's wife, or had ever been sold to C, or any one else to pay delinquent taxes, which C by reply filed denied, by general denial of that specific part of said defendant's said answer, which alleged said lot to be 51x126 feet. The court in its decree found that said lot 13 was more particularly described as 51x126, but did not find whether or not more than 40x120 feet had ever been taxed to his wife or sold for taxes, or purchased by C, for delinquent taxes. Now in proceedings to confirm sale had under the decree, these questions arise:

1. Do the pleadings show that more than 40x120 feet were taxed, or sold, for delinquent taxes?

2. Did the defendants deny in their answer that 40x120 feet were sold for delinquent taxes?

3. Is that decree supported by the pleadings in the case, or by C's petition, it never having been amended?

4. Is that decree, after it became final, subject to collateral attack, in further proceedings in the same case, between the same parties, in confirmation of sale—the whole 51x126 feet having been sold under that decree?

5. Did that decree authorize the sale of the whole 51x126 feet, it being acknowledged that only 40x120 had ever been sold for taxes, or purchased by C, or taxed to his wife?

6. Is, or is not, that decree inoperative and null and void for indefiniteness and uncertainty, although definite in itself, without the records in the case?

7. Can a man's land be sold for his wife's taxes on other lands?

8. Can a man's land, sold for delinquent taxes—land definitely described and not denied—be enlarged by the decree to include other of his land not sold, or taxed, or delinquent, and be sold under such decree? Is not that decree null and void?

Omaha, Neb. INQUIRER.

HUMOR OF THE LAW.

A judge in Pennsylvania rebuked a jury by saying: "Enter the judgment, Mr. Clerk." "Now enter another vacating it." "I want it understood that it takes thirteen men to steal a man's farm in my court."

Thomas Flatly of Boston, the well-known Irish lawyer and wit, was acting for the defense in a divorce case, and during the cross-examination of the plaintiff asked the following question: "You wish to divorce this woman because she drinks?" "Yes, sir." "Do you drink yourself?" "That's my business," said the witness angrily. Whereupon the lawyer, with face unmoved, asked one question: "Have you any other business?"

In the city of Richmond "Justice John" is a terror to the law-breaking element of the negro population. Some time ago there were three negro girls up before him on the charge of having called three females of the same color "——— dogs." The justice first called the accusers and asked them what they had to say. The reply was: "Mr. Crutchfield, 'dem gals called us 'dogs.'" Then, turning to the prisoner, the justice asked them what they had to say. They replied: "Jege, we didn't call 'dem dogs'; 'dey called us 'dogs'" whereupon the celebrated jurist delivered his decision, in these words: "It is the opinion of the court that you are all dogs, and he fines you ten dollars each. We are bound to get enough money to pay for this city hall."

If a prisoner is tired of saying "not guilty, m'lud," he may vary the monotony of that proceeding by pointing to the prosecutor and remarking: "He is a liar."

Five eminent English judges, after full consideration of this important question, reached the conclusion that the two are practically exchangeable terms, or, at all events, that the one phrase is merely a hyperbolical form of the other.

"The statement that the prosecutor was a liar," said Mr. Justice Darling, "appears to me to be merely a repetition of Rouse's plea of not guilty—with emphasis.

"It was only because he was in court," added the judge, solemnly, that Rouse did not specify the particular kind of liar the prosecutor was.

"He did nothing more than he had a right to. He put his statement in the emphatic way of a man of his class."

"In the heat of cross-examination, he said of one man what the psalmist in his haste said of all men."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADMIRALTY—Limitations.—While statutes of limitation, as such, are not enforced by courts of admiralty, such statutes will ordinarily be followed by analogy, in the absence of exceptional circumstances.—The Southwark, U. S. D. C., E. D. Pa., 128 Fed. Rep. 149.

2. APPEAL AND ERROR—Abandoned Appeal.—Where former appeal is abandoned on oral argument, its pendency held not to prevent prosecution of subsequent appeal.—Noble v. Whitten, Wash., 76 Pac. Rep 95.

3. ASSOCIATIONS—Expulsion of Member.—A member of an unincorporated association, wrongfully expelled, may sue for damages, and is not remitted to mandamus to compel reinstatement.—Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc., Conn., 57 Atl. Rep. 692.

4. APPEAL AND ERROR—Findings of Auditor.—Findings of fact by an auditor will not be reviewed, where the testimony relating to such findings has not been printed. —*In re* Penn-Gaskell's Estate, Pa., 57 Atl. Rep. 715.

5. APPEAL AND ERROR—Issues Raised.—To show error, in that a charge ignored defense of assumed risk, appellant's brief must show that evidence raised such issue. —International & G. N. Ry. Co. v. Reeves, Tex., 79 S. W. Rep. 1099.

6. APPEAL AND ERROR—Objections not Taken Below. —An objection to the form of the justification of sureties on an appeal bond must be taken in the lower court.—Frew v. Clark, Wash., 76 Pac. Rep. 85.

7. ATTORNEY AND CLIENT—Loss Through Negligence of Attorney.—An attorney held liable for loss through his negligence, to exemplary damages to his client.—Patterson & Wallace v. Frazer Tex., 79 S. W. Rep. 1077.

8. BANKRUPTCY—Avoidance of Transfers.—A delivery of property by a debtor to a creditor, to be applied on his indebtedness at stipulated prices when sold, held sufficient to pass the property, as against a trustee in bankruptcy of the debtor, appointed in proceeding instituted more than four months thereafter.—Allen v. Hollander, U. S. C. C., D. Mass., 128 Fed. Rep. 159.

9. BANKRUPTCY—Failure to Appoint Trustee.—A failure to appoint a trustee in bankruptcy did not discharge debtor of the bankrupt against whom an action was pending.—Griffin v. Mutual Life Ins. Co., Ga., 46 S. E. Rep. 870.

10. BANKRUPTCY—Fraudulent Transfer of Property.—Creditors may attack a fraudulent transfer of property by a bankrupt to his wife as a gift, although made more than four months prior to the bankruptcy.—*In re* Toothaker Bros., U. S. D. C., D. Conn., 128 Fed. Rep. 187.

11. BANKRUPTCY—Insolvency.—In an action by a trustee in bankruptcy to recover goods of a mortgagee of the insolvent, testimony of the referee in bankruptcy was incompetent to establish insolvency.—Cullinane v. State Bank, Iowa, 98 N. W. Rep. 887.

12. BANKRUPTCY—Intervention by Trustee.—A failure to appoint a trustee in bankruptcy did not discharge a debtor of the bankrupt against whom an action was pending.—Griffin v. Mutual Life Ins. Co., Ga., 46 S. E. Rep. 870.

13. BANKRUPTCY — Liens. — Under Bankrupt Act, July 1, 1898, ch. 541, § 70a, trustee in bankruptcy takes title free from liens subsequently arising under Act March 30, 1892, on fund due bankrupt from municipality.—Garretson v. Clark, N. J., 57 Atl. Rep. 414.

14. BANKRUPTCY—Payment for Services. — Under the Pennsylvania statute of 1893 (P. L. 344), which permits a wife to contract with her husband for payment for her services rendered outside the family relation, a wife may prove a claim for services rendered under such a contract against his estate in bankruptcy.—*In re* Domenig, U. S. D. C., E. D. Pa., 128 Fed. Rep. 146.

15. BANKS AND BANKING—Deposit of Draft.—A bank may rely on the solvency of the drawer of a draft, deposited on his account with it, and may charge the same back to the drawer if not paid by the drawee.—Hendley v. Globe Refinery Co., Mo., 79 S. W. Rep. 1163.

16. BANKS AND BANKING—Recovering Misappropriated Funds.—A bank may recover funds misappropriated by its cashier from one receiving them from the cashier with knowledge of the misappropriation.—Kitchens v. J. H. Teasdale Commission Co., Mo., 79 S. W. Rep. 1177.

17. BANKS AND BANKING — Taxation of Franchise.— While right to do banking business is not a franchise, the right to carry on such business through the agency of a corporation is a franchise.—Bank of California v. City and County of San Francisco, Cal., 75 Pac. Rep. 832.

18. BENEFIT SOCIETIES—Repudiation of Certificate During Life of Member.—Where a benefit certificate is repudiated during the life of the member, he need not continue payment of assessments to entitle himself to damages.—O'Niel v. Supreme Council American Legion of Honor, N. J., 57 Atl. Rep. 463.

19. BILLS AND NOTES—Unaccepted Draft.—An unaccepted draft, when not indicating by its terms an assignment of the debt, nor accompanied by a verbal assignment, is no evidence of debt against the drawee.—Gamer v. Thomson, Tex., 79 S. W. Rep. 1083.

20. BOUNDARIES—Sale of Land.—A purchaser of land held affected with notice of rights of one who has part of it fenced and is occupying a house thereon.—Parrish v. Williams, Tex., 79 S. W. Rep. 1097.

21. BRIDGES—Powers of County Supervisors.—County board of supervisors, having contracted for a bridge, held to have power to contract for extra work, without advertising for bids.—Marion County v. Foxworth, Miss., 36 So. Rep. 36.

22. BROKERS — Commissions.—Real estate brokers held not entitled to recover commissions from client, in view of alteration in terms of sale not communicated to

her.—Humphrey-Gibson Co. v. Robinson, N. Car , 46 S. E. Rep. 953.

23. BROKERS—Unauthorized Option.—A co-agent under power to sell is not bound by an unauthorized option, not given or authorized by himself.—Tibbs v. Zirkle, W. Va., 46 S. E. Rep. 701.

24. BUILDING AND LOAN ASSOCIATION—Recovery of Usury Paid.—Where, under a usurious contract with a building association, after applying all sums paid, more than the full amount of the debt, with legal interest, has been paid, there may be a decree for the excess.—Harper v. Middle States Loan, Building & Construction Co., W. Va , 46 S. E. Rep. 817.

25. CARRIERS—Acceptance of Contract Limiting Common Law Liability.—A contract releasing a carrier from liability fer loss or damage to baggage not resulting from negligence, to be binding on the passenger, must have been accepted by him with knowledge of its terms; and such knowledge will not be implied.—Saunders v. Southern Ry. Co., U. S. C. C. of App., Sixth Circuit, 128 Fed. Rep. 15.

26. CARRIERS—Delay in Delivering Goods —Delay on the part of a carrier in delivering goods is not a conversion.—Ryland & Rankin v. Chesapeake & O. Ry. Co., W. Va., 46 S. E. Rep. 923.

27. CARRIERS—Duty to Furnish Safe Place to Alight.—A carrier held guilty of actionable negligence in failing to provide a safe place and means for a female passenger to alight.—Ellis v. Chicago, M. & St. P. Ry. Co., Wis., 98 N. W. Rep. 942.

28. CARRIERS—Escaping Cinders.—It is negligence, with respect to a passenger, for a railroad not to equip its engine with proper appliances to prevent the escape of sparks and cinders.—Missouri, K. & T. Ry. Co. of Texas v. Flood, Tex., 79 S. W. Rep. 1106.

29. CARRIERS—Liability for Wrong Delivery.—Carrier bears risk of delivering goods to persons entitled to them under bill of lading and indorsements.—Grayson County Nat. Bank v. Nashville, C. & St. L. Ry., Tex., 79 S. W. Rep. 1094.

30. CARRIERS — Mistake of Ticket Agent.—Railroad held responsible for mistake of ticket agent, resulting in ejection of passenger.—Illinois Cent R. R. v. Jackson, Ky., 79 S. W. Rep. 1187.

31. CARRIERS—Reasonable Limitation of Common Law Liability.—It is the settled law that a common carrier may contract for a reasonable limitation of its common-law liability for loss or damage to either freight or baggage, not resulting from its own negligence or that of its servants.—Saunders v. Southern Ry. Co., U. S. C. C. of App., Sixth Circuit, 128 Fed. Rep. 15.

32. CHATTEL MORTGAGES—Failure to Record.—A chattel mortgage is invalid as to debts contracted after its execution and before it is recorded, but is valid as to debts contracted before its execution, if recorded before seizure.—Harrison v. South Carthage Min. Co., Mo., 79 S. W. Rep. 1160.

33. COLLISION—Excessive Speed in Fog.—A steamer entering a fog bank on the York river at a speed of 10 miles an hour held in fault for collision with an oyster schooner, which she ran down and sank, before she could stop, after hearing the schooner's fog horn.—The Charlotte, U. S. C. C. of App., Fourth Circuit, 128 Fed. Rep. 38.

34. COMMON LAW — Effect of Repealing Declaratory Statute.—Where a statute that is declaratory of the common law is repealed, the common law is not thereby repealed.—Harper v. Middle States Loan, Building & Construction Co., W. Va., 46 S. E. Rep. 817.

35. COMMON LAW—Not Displaced by Statute, Governs as to Usury.—Such parts of the common law as have not been displaced by existing statutes or expressly repealed are still in effect.—Harper v. Middle States Loan, Building & Construction Co., W. Va., 46 S. E. Rep. 817.

36. CONSTITUTIONAL LAW — Class Legislation.—Act March 14, 1901, p. 67, ch. 67, restricting the sale of merchandise by an indebted merchant, except in the ordinary course of business, held unconstitutional as class legislation.—Block v. Schwartz, Utah, 76 Pac. Rep. 22.

37. CONSTITUTIONAL LAW—Contempt of Court.—Power to punish for contempt is inherent in district courts, and cannot be taken away or seriously impaired by the legislature.—State v. Clancy, Mont., 76 Pac. Rep. 10.

38. CONSTITUTIONAL LAW—Establishment of Excise Board.—Act March 21, 1901 (P. L. 1901, p. 239), establishing an excise department in incorporated cities and towns, is not unconstitutional in authorizing the common council to call on a court to appoint an excise board for the municipality.—Schwartz v. City of Dover, N. J., 57 Atl. Rep. 394.

39. CONSTITUTIONAL LAW—Impairment of Contract.—A policeman, by continuing to hold his office after the passage of a policemen's pension act, held not to acquire a vested right thereunder which could not be disturbed by subsequent legislation.—State v. Board of Trustees of Policemen's Pension Fund, Wis., 98 N. W. Rep. 954.

40. CONSTITUTIONAL LAW—Taxing Franchise of Banking Corporation.—An assessment for taxation of the corporate franchise of a banking corporation is not a violation of Const. U. S. Amend. 14.—Bank of California v. City and County of San Francisco, Cal., 75 Pac. Rep. 832.

41. CONTINUANCE—Surprise.—In applications for continuance on the ground of surprise by an amendment to pleadings, the party claiming surprise must make oath, under Civ. Code 1895, § 5128, that such surprise is not claimed for delay.—Atlantic & B. R. Co. v. Douglas, Ga., 46 S. E. Rep. 867.

42. CONTRACTS—Action.—Where a party to a contract gives a reason for his refusal to carry it out, he cannot, after litigation, put his conduct on another consideration.—Hixson Map Co v. Nebraska Post Co., Neb., 98 N. W. Rep. 872.

43. CONTRACTS—Insurance in Benefit Society.—Where a contract embodies interdependent conditions and obligations, and one party refuses to be longer bound thereby, the other party may treat the contract as terminated, and maintain an action for damages.—O'Neill v. Supreme Council American Legion of Honor, N. J., 57 Atl. Rep. 463.

44. CONTRACTS—Limiting Liability of Carrier —A contract limiting carrier's liability for loss of hogs to $5 each held unreasonable and void.—Nashville, C. & St. L. Ry. Co. v. Stone & Haslett, Tenn., 79 S. W. Rep. 1031.

45. CONTRACT—Parol Agreement Under Written Contract.—In an action on a written contract providing for the payment of $750 "as hereafter agreed," it was not error to refuse to strike the plea setting up that under the agreement of the parties the $750 was to be paid out of the profits of the business sold.—Morrison v. Dickey, Ga., 46 S. E. Rep. 863.

46. CONTRACTS—Parol Rescission of Written Contract.—Where a parol contract rescinding a contract under seal has been acted upon, the rule that the contract must be discharged in the same form as that in which it was made does not apply.—Arbogast v. Mylius, W. Va., 46 S. E. Rep. 809.

47. CORPORATIONS—Action by Stockholders.—A defense to a bill to restrain the negotiation of corporate bonds, consisting of facts arising after issue joined, could be set up only by a cross-bill in the nature of a plea *puis darrein* continuance.—McAlpin v. Universal Tabacco Co., N. J., 57 Atl. Rep. 418.

48. CORPORATIONS—Building Associations.—By compliance with state law, foreign corporations have the same rights as, and no greater than, domestic, and their contracts are governed by same rules.—Hiskey v. Pacific States Savings, Loan & Building Co., Utah, 76 Pac. Rep. 20.

49. CORPORATIONS—Contract of Employment —A resolution of a *de facto* board of directors of a corporation, providing for the employment of a sales agent of the corporation, cannot be annulled by the action of the president alone.—Collier v. Consolidated Ry. Lighting & Refrigerating Co., N. J., 57 Atl. Rep. 417.

50. CORPORATIONS — Estoppel to Deny Authority of Officers.—A corporation held estopped to deny the authority of its president, secretary and treasurer to employ plaintiffs to rent certain buildings belonging to the corporation.—Pescia v. Societa Co-operativa Corleonese Francesco Bentivegna, 86 N. Y. Supp. 952.

51. CORPORATIONS—Forfeiture of Charter.—The right of an attorney general to sue to set aside a corporation's articles for fraud was not conferred by Code, § 2788.—Attorney General v. Holly Shelter R. Co., N. Car., 46 S. E. Rep. 959.

52. CORPORATIONS — Married Woman's Transfer of Stock.—Though a corporation may at the instance of a married woman transfer to her husband shares of its stock issued to her, but which she had sold to him, it cannot be accountable to her therefor, unless, when it made the transfer, or before the stock got into the hands of an innocent purchaser, it had notice of the relation existing between the parties.—Bigby v. Atlanta & W. P. R. Co., Ga., 46 S. E. Rep. 827.

53. COSTS—Assignment of Cause of Action to Attorney. —Plaintiff's attorney, though owner of part of cause of action, cannot be treated as party, for the purpose of giving security for costs.—International & G. N. Ry. Co. v. Reeves, Tex., 79 S. W. Rep. 1099.

54. COSTS — Settlement Pending Suit.—Where judgment of dismissal is rendered because of a voluntary settlement, no costs should be allowed.—Dr. Shoop Family Medicine Co. v. Schowalter, Wis., 98 N. W. Rep. 940.

55. COURTS—Citizenship of Administrator.—A statute, providing that a nonresident cannot act as administrator, does not make an administrator appointed therein a citizen of the state, for the purpose of the jurisdiction of a federal court, which is determined by his actual citizenship.—McDuffie v. Montgomery, U. S. C. C., N. D. Ill., 128 Fed. Rep. 105.

56. COURTS—Qualifications of Short Hand Reporter.— Under Pen. Code, § 869, it is not necessary that there should be a preliminary showing as to the qualification of a shorthand reporter appointed by an examining magistrate.—People v. Nunley, Cal., 76 Pac. Rep. 45.

57. COURTS—Settlement Pending Suit.—Where a Suit is voluntarily settled before judgment, the court should enter judgment dismissing both complaint and counterclaim.—Dr. Shoop Family Medicine Co. v. Schowalter, Wis., 98 N. W. Rep. 940.

58. COURTS—Territorial Practice and Procedure.—The district courts of the territory of Oklahoma, when sitting with the powers of the Circuit and District Courts of the United States, are governed by the territorial procedure.—Welty v. United States, Okla., 76 Pac. Rep. 121.

59. COVENANTS—Warranties of Life Tenant.—Code, § 1334, abolishing collateral warranties, and declaring warranties by life tenant void, warranty of life tenant of title in fee simple held to have the effect only of a personal covenant.—Hauser v. Craft, N. Car., 46 S. E. Rep. 756.

60. COVENANTS—Warranty.—The grantor in a deed held not liable on his covenant of warranty; the grantee having got what he thought he was buying, though the land was not of dimensions stated.—Parrish v. Williams, Tex., 79 S. W. Rep. 1097.

61. CRIMINAL EVIDENCE—Time for Introducing.—Receiving evidence in reply in criminal cases which should have been offered in chief held not error.—State v. Thompson, S. Car., 46 S. E. Rep. 941.

62. CRIMINAL LAW—Amendment of Minutes.—The circuit courts have power, on notice, in the presence of the defendant, to amend the minutes to show that defendant was duly arraigned and pleaded not guilty.—Cooper v. State, Fla., 36 So. Rep. 53.

63. CRIMINAL LAW—Reasonable Doubt.—Reasonable doubt defined as such doubt as may reasonably control the conviction and judgment of reasonable, intelligent, and impartial men acting under the sanction of an oath.—State v. Carr, Del., 57 Atl. Rep. 870.

64. CRIMINAL TRIAL—Correction of Judgment.—A conviction being regular, appellant is not entitled to a new trial for error as to the penalty, but is entitled to a judgment which should be entered by the trial court on remanding the cause.—State v. Houghton, Oreg., 75 Pac. Rep. 822.

65. CRIMINAL TRIAL—Failure to Verify Information.— A defendant, in order to avail himself of the failure of the prosecution to verify the information, must raise the objection by motion to quash.—State v. Brown, Mo., 79 S. W. Rep. 1111.

66. CRIMINAL TRIAL — Former Jeopardy.—A person may be convicted of violating a city ordinance, and also for the same offense under the state laws.—State v. Sanders, S. Car., 47 S. E. Rep. 55.

67. CRIMINAL TRIAL—Minority of Juror.—The refusal to set aside a verdict in a criminal case, because a juror was under 21 years old, held not reversible error.—State v. Lipscomb, N. Car., 47 S. E. Rep. 44.

68. CRIMINAL TRIAL—Severance of Joint Indictment. —A severance will not be granted to one of two defendants jointly indicted on the ground that the wife of the other defendant is an important witness for defendant asking the severance.—State v. Smith, Del., 57 Atl. Rep. 868.

69. CRIMINAL TRIAL — Witness Remaining in Court Room.—In a criminal trial, it was not an abuse of discretion to allow the sheriff, who was also a witness for the state, to remain in the court room during the trial. People v. Nunley, Cal., 76 Pac. Rep. 45.

70. CURTESY—Married Woman as Heir.—Where one dies seised in fact of an estate of inheritance, and one of his heirs is a married woman and dies, she has seisin in fact, so as to entitle her surviving husband to curtesy. —Bragg v. Wisemen, W. Va., 47 S. E. Rep. 90.

71. DAMAGES—As Affected by Insurance Carried.—The fact that passenger held and collected on accident policy held not to reduce damages to which he was entitled for his injuries.—Missouri, K. & T. Ry. Co. of Texas v. Flood, Tex., 79 S. W. Rep. 1106.

72. DAMAGES—Examining Defendant as to Financial Condition.—In an action for assault, defendant may be examined as to his financial condition.—Willet v. Johnson, Okla., 76 Pac. Rep. 174.

73. DAMAGES—Excessive Verdict.—In an action against a railroad company for injuries to a boy nine years old, verdict for $2,000 held not excessive.—Euting v. Chicago & N. W. Ry., Co., Wis., 98 N. W. Rep. 944.

74. DAMAGES—Rental Value of Houses.—In an action for injuries to land, damages consisting of the rental value of houses, which plaintiff contemplated erecting, held speculative, and not recoverable.—Mahoney v. Kansas City, Mo., 79 S. W. Rep. 1168.

75. DEATH—Delivery of Deed.—So long as the probate and registration of a deed stand unimpeached, they furnish sufficient *prima facie* evidence of the execution and delivery of the deed.—Wetherington v. Williams, N. Car., 46 S. E. Rep. 728.

76. DEDICATION—Street in Platted Tract.—Acceptance or nonacceptance by town of street dedicated by platting tract held not to affect title thereto.—Hughes v. Clark, N. Car., 46 S. E. Rep. 956.

77. DEEDS—Execution Sale.—Where a security deed is executed to M guardian of P, and on default M, as such guardian, conveys the property to the debtor for the purpose of execution sale, the purchaser obtains a good title as against M, either as an individual or as guardian.—Arrowwood v. McKee, Ga., 46 S. E. Rep. 871.

78. DESCENT AND DISTRIBUTION—Seizin.—Where one dies intestate, seised in fact of land, that seisin in fact is cast by descent on his heirs, who have seisin in fact without entry.—Bragg v. Wiseman, W. Va., 47 S. E. Rep. 90.

79. DISCOVERY—Production of Books and Papers.—It was not error to permit defendant to produce, in lieu of

an original document specified in a notice, a certified copy of the duplicate required to be kept by law in the executive department of the state.—Branan v. Nashville, C. & St. L. Ry. Co., Ga., 46 S. E. Rep. 882.

80. DIVORCE—Desertion.—Willful desertion, warranting divorce, is a breach of matrimonial duty, and is composed of a breaking off of all matrimonial connections with an intent to desert.—Tillis v. Tillis, W. Va., 46 S. E. Rep. 926.

81. DIVORCE—Residence of Parties.—The supreme court will refuse jurisdiction of a suit for divorce by a husband, when there is neither allegation nor proof that the wife was ever in the state, nor allegation or proof that the husband is domiciled in the state.—Blake v. Dudley, La., 36 So. Rep. 203.

82. EJECTMENT — Action by Decedent's Heirs.—Heirs of decedent held not entitled to maintain ejectment, pending administration and before the debts are paid, against one in possession paying rent to the administrator.—Hopson v. Oxford, Ark., 79 S. W. Rep. 1051.

83. EJECTMENT — Appropriation of Highway.—Owner of fee of land subject to an easement for a highway may maintain ejectment against an intruder thereon.—Bork v. Unit d New Jersey R. & Canal Co., N. J., 57 Atl. Rep. 412.

84. ELECTIONS—Primary Election.—In the absence of statutes, the question of a party nomination must be decided by the party concerned.—State v. Foster, La., 36 So. Rep. 200.

85. ELECTIONS—Sale of Intoxicating Liquors on Election Day.—Acts 1901, p. 266, ch. 89, providing a complete scheme for the conduct of regular elections in the state, supersedes all preceding acts to the same general effect. State v. Edwards, N. Car., 46 S. E. Rep. 766.

86. ELECTION OF REMEDIES — Waiver of Inconsistent Remedy.—Where a party has two inconsistent causes of action, an election to proceed upon either is a waiver of the other.—Whipple v. Stephens, R. I., 57 Atl. Rep. 375.

87. ELECTRICITY—Diligence Required of Company.—A company transmitting an electric current of dangerous power owes a duty to take reasonable care to prevent the escape of the current in case of contact with the wires without fault.—Brooks v. Consolidated Gas Co., N. J., 57 Atl. Rep. 396.

88. ELEVATORS—Private Switch.—Condemnation proceedings held not proper to compensate private person for removal of private switch on railroad company's land.—Swift v. Delaware, L. & W. R. Co., N. J., 57 Atl. Rep. 456.

89. EMINENT DOMAIN—Fishing Rights.—The right to fish in an inland lake can not be separated from the ownership of the lake and taken under the power of eminent domain, as authorized by P. L. 1901, p. 333, ch. 161.—Albright v. Sussex County Lake & Park Commission. N. J., 57 Atl. Rep. 398.

90. EQUITY — Amending Answers.—Courts are much stricter in permitting amendments to answers in equity than to bills.—Raliff v. Sommers, W. Va., 46 S. E. Rep. 712.

91. EQUITY—Testamentary Trust.—In so far as the answer to a bill by a testamentary trustee against his cotrustees and *cestuis que trust* sought affirmative relief, it is held that it should be stricken out.—Paine v. Sackett, R. I., 57 Atl. Rep. 376.

92. ESTOPPEL—Objection Not Made in Trial Court.—Claim that a certain act constituted an estoppel may not be made for the first time on appeal.—Watkins v. Iowa Cent. Ry. Co., Iowa, 98 N. W. Rep. 910.

93. ESTOPPEL—Where Facts are Within the Knowledge of Both Parties.—There was no estoppel, where all facts and circumstances were equally within the knowledge of both parties.—Hiskey v. Pacific States Savings, Loan & Building Co., Utah, 76 Pac. Rep. 20.

94. EVIDENCE—Admissibility.—A party who has availed himself of improper evidence cannot complain of the opposite party having gone into the same matter on cross-examination.—Cronk v. Wabash R. Co., Iowa, 98 N. W. Rep. 884.

95. EVIDENCE—Comparative Negligence.—A diagram showing the situation of a cellar door in defendant's store, into which plaintiff fell, is admissible to illustrate the testimony of the witness.—Franklin v. Engel, Wash., 76 Pac. Rep. 84.

96. EVIDENCE—Guaranty.—Where defendant and a representative of plaintiff entered into a parol agreement by which defendant was to become liable for a debt of a third person, and subsequently defendant wrote plaintiff a letter giving his understanding of the agreement, the letter was not the contract, and defendant could show it by parol.—Huxford v. Meinhart & Schaul, Ga., 46 S. E. Rep. 852.

97. EVIDENCE—Legality of Ordinance.—On an issue as to whether an ordinance was properly passed, parol evidence by a member of the council is admissible to show the actual vote by which it passed.—Gove v. City of Tacoma, Wash., 76 Pac. Rep. 73.

98. EVIDENCE — Pleading Foreign Statutes.—Where defendant pleads that contract executed in foreign state is usurious, plaintiff should in his reply plead laws of foreign state to maintain his contract.—Columbian Building & Loan Assn. v. Rice, S. Car., 47 S. E. Rep. 63.

99. EVIDENCE—Postal Registry Receipt.—A postal registry receipt, signed for a corporation by a private individual, without any proof of authority, held inadmissible to show receipt of letter by the corporation.—Underwriters' Fire Assn. v. Henry, Tex., 79 S. W. Rep. 1072.

100. EVIDENCE—Record Entries.—Where the return to a writ of execution is competent evidence, it is also competent to prove the issuance of the writ by the clerk's docket.—Shoup v. Marks, U. S. C. C. of App., Ninth Circuit, 128 Fed. Rep. 32.

101. EXECUTORS AND ADMINISTRATORS—Acceptance of Succession.—Where the heirs have not accepted a succession, an administrator may stand in judgment for the purpose of a suit, pending against the *de cujus* at the date of his death, for the recovery of the immovable property.—Vicksburg, S. & P. R. Co. v. Tibbs, La., 36 So. Rep. 223.

102. EXECUTORS AND ADMINISTRATORS—Liability for Loss of Assets.—An administrator who, with the approval of the beneficiaries in the estate, deviated from the line of his duty, held not liable for the loss to the estate resulting therefrom.—Appeal of Matthews, Conn., 57 Atl. Rep. 694.

103. EXECUTORS AND ADMINISTRATORS—Settlement of Speculative Account.—The good faith of an administrator, carrying a speculative account belonging to his intestate, held no defense for his failure to settle it in a reasonable time.—Appeal of Matthews, Conn., 57 Atl. Rep. 694.

104. EXEMPTIONS—Alimony Where Husband is Head of Family.—The wages of a married man, supporting his mother, two minor brothers, and invalid sister, held not subject to garnishment on a judgment in favor of the wife for alimony, pending a suit for maintenance.—Jarboe v. Jarboe, Mo., 79 S. W. Rep. 1162.

105. EXEMPTIONS—Wages Paid in Advance.—A contract providing for the payment of the wages of a servant in advance held not in fraud of the servant's creditors, where the wages are exempt from execution.—Jarboe v. Jarboe, Mo., 79 S. W. Rep. 1162.

106. FALSE IMPRISONMENT—Damages as Affected by Honest Mistake. — Five hundred dollars damages held not excessive for slander and false imprisonment, though there was an honest mistake.—Dunlevy v. Wolferman, Mo., 79 S. W. Rep. 1165.

107. FIRE INSURANCE—Mutual Mistake.—To recover on fire insurance policy on ground of mistake in description of property, it must be shown that mistake was natural.—Underwriters' Fire Assn. v. Henry, Tex., 79 S. W. Rep. 1072.

108. FORCIBLE ENTRY AND DETAINER—Title Not Litigated.—Where, to determine the right of possession, the

court must determine which party has the paramount title, forcible entry and detainer will not lie.—Jones v. Seawell, Okla., 76 Pac. Rep. 154.

109. FRAUDULENT CONVEYANCES—Action to Annul.—A petition which assails a series of sales as fraudulent simulations, not devesting the title of the original owner, shows a cause of action, though as to some the consideration is referred to as "real or pretended."—S. Blum & Co. v. Wyly, La., 36 So. Rep. 202.

110. FRAUDULENT CONVEYANCES—Personal Property.—The transfer of a lot of railroad scrapers, not accompanied by immediate delivery and actual change of possession, held conclusively presumed to be fraudulent against the grantor's creditors.—Washburn v. Oates, Okla., 76 Pac. Rep 151.

111. GARNISHMENT—Partnership.—Where tobacco was sold by a corporation to a firm, garnishment levied against the buyer as a corporation on a debt alleged to be due to the seller as a partnership held no defense to an action for the price of the goods sold.—Tapp v. Dibrell, N. Car., 47 S. E Rep. 51.

112. GUARDIAN AND WARD—Rights of Father.—Under Code Civ. Proc. § 1751, father held entitled to guardianship of minor, on being found competent therefor, notwithstanding child's health would be promoted by grandmother's custody, which the court intended to be only temporary.—*In re* Salter, Cal., 76 Pac. Rep. 51.

113. HEALTH — Powers of City Council.—That a city council has provided another officer to supply medical attendance in quarantine cases shows that the furnishing of such attendance is not committed to the health officers.—Congdon v. City of Nashua, N. H., 57 Atl. Rep. 686.

114. HOMICIDE—Defense of Insanity.—The mere fact that defendant, on trial for murder, frequently became intoxicated, is not sufficient to warrant an instruction submitting the question of defendant's insanity.—State v. Brown, Mo., 79 S. W. Rep. 1111.

115. HOMICIDE — Intoxication.—Voluntary intoxication, not resulting in settled frenzy or insanity, does not excuse or mitigate any degree of unlawful homicide below murder in the first degree.—Thomas v. State, Fla., 36 So. Rep. 161.

116. HUSBAND AND WIFE — Accord and Satisfaction.—Where the husband indorses a contract of accord and satisfaction made by his wife, she is bound thereby so far as her coverture is concerned.—Brundige v. Nashville, C. & St. L. R. R., Tenn , 79 S. W. Rep. 1027.

117. HUSBAND AND WIFE—Action for Alimony.—Cruelties of the husband, which have been forgiven, may be considered, when others have followed, until the wrong becomes unbearable.—Levin v. Levin, S. Car., 46 S. E. Rep. 945.

118. HUSBAND AND WIFE — Liability for Husband's Debts.—Proceeds of a married woman's interest in a mining partnership, which was exempt from liability for her husband's debts where earned, was not liable therefor in Washington.—Elliott v. Hawley, Wash., 76 Pac. Rep. 93.

119. INDICTMENT AND INFORMATION — Reasonable Doubt as to Degree of Crime.—A reasonable doubt as to the existence of an element of the higher degree of an offense held to call for the verdict of the lower degree.—Galloway v. State, Fla., 36 So. Rep. 168.

120. INDICTMENT AND INFORMATION—Waiver of Verification.—A failure to verify an information may be waived by defendant.—State v. Brown, Mo., 79 S. W. Rep. 1111.

121. INJUNCTION—Nontransferable Railroad Tickets.—A railroad is entitled to an injunction to restrain ticket brokers from buying and selling tickets issued by it to persons who, in consideration of reduced rates, have contracted not to transfer the same; the nontransferability being stated on their face.—Louisville & N. R. Co. v. Bitterman, U. S. C. C., E. D. La., 128 Fed. Rep. 176.

122. INTERPLEADER—When Granted.—Before a stakeholder can call on adverse claimants of funds in his hands to interplead, he must show that their claims have such a foundation in law as will create a reasonable doubt as to their rights.—Franklin v. Southern Ry. Co., Ga., 47 S. E. Rep. 344.

123. INTOXICATING LIQUORS — Sale on Sunday.—A sale of intoxicating liquors under Laws 1895, p. 8, ch. 4322, § 9, is without validity on Sunday, and the licensee may be convicted of selling without a license.—Crabb v. State, Fla., 36 So. Rep. 169.

124. JUDGMENT—Entry Nunc Pro Tunc Order.—Motion for *nunc pro tunc* record entry of judgment cannot be made on oral testimony, but only on written *data*.—Sperling v. Stubblefield, Mo., 79 S. W. Rep. 1172.

125. JUDGMENT—Estoppel.—A litigant, denying a certain proposition of law and fact, and obtaining a judgment sustaining his position, cannot thereafter assert that which he had thus denied.—Vicksburg, S. & P. R. Co. v. Tibbs, La., 36 So. Rep 228.

126. JUDGMENT—Joint Defendants.—Joint defendants, as between themselves, are concluded by the judgment obtained against them as to all issues which they did or could have litigated in defense to the action in which the judgment was obtained.—Boston & M. R. R. v. Sargent, N. H , 57 Atl. Rep. 688.

127. JUDGMENT — Landlord and Tenant.—Judgment for tenant in summary proceedings held not an estoppel on landlord, to extent of precluding him from showing in subsequent action proportion of crops to which he was entitled.—Burwell v. Brodie, N. Car , 47 S. E. Rep. 47.

128. JUDGMENT—Time of Motion to Open Default.—Under Civ. Code 1895, § 5072, a trial judge cannot grant a motion to open a default at any term subsequent to that at which the case is called for trial.—Cauley v. Wadley Lumber Co., Ga., 46 S. E. Rep. 852.

129. JURY—Conflicting Statements in Instructions.—The jury cannot select one part of a charge, to the exclusion of the other, nor decide between the conflicts therein.—Morrison v. Dickey, Ga., 46 S. E. Rep. 863.

130. LANDLORD AND TENANT—Damages for Eviction.—Landlord, by wrongful institution of summary proceedings and eviction of tenant, held not to forfeit his rights as to credit for seeds furnished.—Burwell v. Brodie, N. Car., 47 S. E. Rep. 47.

131. LANDLORD AND TENANT—Destruction of Leased Property.—Where a building, in possession of a tenant under a lease for a fixed term, is destroyed by the negligence of another, the tenant and owner are each entitled to recover the damage each has sustained.—Nashville, C. & St. L. Ry. v. Heikens, Tenn., 79 S. W. Rep. 1038.

132. LANDLORD AND TENANT—Lease.—A lease implies recognition of the lessor's title and promise to surrender possession on the termination of the lease.—Harvin v. Blackman, La., 36 So. Rep. 213.

133. LANDLORD AND TENANT—Suit by Municipality.—Where the owner of land voluntarily becomes the lessee of one who has no title, he is estopped to deny that the lessor is the owner.—Town of Morgan City v. Dalton, La., 36 So. Rep. 208.

134. LIBEL AND SLANDER—Honest Mistake.—Honest mistake will not excuse slander, but is to be considered only in mitigation of damages.—Dunlevy v. Wolferman, Mo., 79 S. W. Rep. 1165.

135. LIENS—Rights of Landlord.—By no agreement between the holders of privileges, first and third in rank, can the holder of a privilege second in rank be subordinated to both of the others.—Southern Grocer Co. v. Adams, La., 36 So. Rep. 226.

136. LIFE INSURANCE—Authority of Agent.—An insurance company held responsible to the parties with whom its agent transacts business for his acts and declarations within the scope of his employment.—Medley v. German Alliance Ins. Co., W. Va., 47 S. E. Rep. 101.

137. LIFE INSURANCE — Consideration for Note. — A promise on the part of an insurance agent to forward

premiums out of his own funds for insured is a valid consideration for a note given for the premiums.—White v. McPeck, Mass., 70 N E. Rep. 463.

138. LIFE INSURANCE—Fraud Inducing Settlement. —Where, in an action on a life policy, a contract of settlement is pleaded, a reply which alleges that the settlement was induced by fraud, but does not allege a payment or tender of the amount received, is insufficient.—Manhattan Life Ins. Co. v. Burke, Ohio, 70 N. E. Rep. 74.

139. MANDAMUS—Inspection of Pollbooks. — Several persons, making application to a clerk of the county court for inspection of public records, if entitled to the inspection, may unite in mandamus to compel it.—Payne v. Staunton, W. Va., 46 S. E. Rep. 927.

140. MECHANIC'S LIENS—Subcontractor. — Where a builder contracts with an owner of land to construct a building for him, and a materialman contracts in relation thereto, if the material is used in the building, he is entitled to a mechanic's lien as a subcontractor. — Ryndak v. Seawell, Okla., 76 Pac. Rep. 170.

141. MONOPOLIES—Combination to Control Competing Interstate Railways.—A combination of stockholders in two competing interstate railway companies to form a stockholding corporation, which should acquire a controlling interest in the capital stock of such railway companies, violates Anti-Trust Act, July 2, 1890, ch. 647, 26 Stat. 209, U. S. Comp. St. 1901, p. 3200.—Northern Securities Co. v. United States, U. S. S. C., 24 Sup. Ct. Rep. 436.

142. MONOPOLIES—Restraint of Trade.—Contract between retailer and wholesaler or manufacturer for exclusive trade in certain gloves in retailer's city held in violation of anti-trust law of 1899, Laws 26th Leg. p. 246, ch. 146.—Francis T. Simmons & Co. v. Terry, Tex., 79 S. W. Rep. 1103.

143. MORTGAGES—Action by Mortgagee for Waste.—In an action by a mortgagee for waste, the measure of damages is the difference in value of the property, unless such difference exceeds the cost of repairing the injury.—E. H. Ogden Lumber Co. v. Busse, 86 N. Y. Supp. 1098.

144. MORTGAGES—Equity of Redemption.—Administrator of deceased mortgagor held entitled to redeem from foreclosure only on the ground that a conveyance of the equity of redemption was fraudulent.—Palmer v. Bray, Mich., 98 N. W. Rep. 849.

145. MORTGAGES—Quieting Title.—An action to compel a defendant, claiming a right to redeem land standing in the name of defendant, to pay the debt, was properly amended by alleging that the interest on the debt exceeded the rental value of the property since it had been held by plaintiff.—Ray v. Pitman, Ga., 46 S. E. Rep. 849.

146. MUNICIPAL CORPORATIONS—Accepting Aid From Private Parties for Bridge.—Contract of corporation, owning suburban property, to pay a portion of the cost of a bridge to be erected by a town held not contrary to public policy.—Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., N. Car., 46 S. E. Rep. 723.

147. MUNICIPAL CORPORATIONS—Cancellation of Building Permit.—City council cannot cancel building permit duly issued under existing general ordinance.—Gallagher v. Flury, Md., 57 Atl. Rep. 672.

148. MUNICIPAL CORPORATIONS—Injury to Passenger in Elevator.—City of Philadelphia held liable to passenger in elevator injured by the negligence of the operator.—Fox v. City of Philadelphia, Pa., 57 Atl. Rep. 356.

149. MUNICIPAL CORPORATIONS — Injury to Street Cleaner.—A street cleaner's failure to look behind him, by reason of which he was injured by a team, held not to constitute contributory negligence as a matter of law.—Turtenwald v. Wisconsin Lake Ice & Cartage Co., Wis., 98 N. W. Rep. 948.

150. NEGLIGENCE—Imputability when One is Riding with Driver.—The negligence of one with whom plaintiff was riding as a guest, in a buggy struck by defendant's train, is not imputable to plaintiff.—Duval v. Atlantic Coast Line R. Co., N. Car., 46 S. E. Rep. 750.

151. NUISANCE—Injury to Property.—Increased danger of fire, inrease of insurance rates, and depreciation of property by erection of a neighboring lawful building are not grounds for injunctive relief against the erection of such a building.—Gallagher v. Flury, Md., 57 Atl. Rep. 672.

152. NUISANCE—Measure of Damages.—The measure of damages to plaintiff's land because of continuing nuisance is not the depreciation of market value, but the loss in its use.—Vogt v. City of Grinnell, Iowa, 98 N. W. Rep. 782.

153. NUISANCE—Public or Private.—Where a city empties its sewerage into a stream, thereby damaging the property of a person outside the city limits, it is a private, and not a public, nuisance.—Matheny v. City o Aiken, S. Car., 47 S. E. Rep. 56.

154. PRINCIPAL and AGENT—Proof of Authority.—Authority of agent to contract to supply steam cannot be inferred from authority to buy and pay for the coal.—Union Hosiery Co. v. Hodgson, N. H., 57 Atl. Rep. 384.

155. PROCESS—Amendment of Summons.—A summons inadvertently made returnable on Sunday will be amended so as to make it returnable on the following Monday.—Lawrence Harbor Colony v. American Surety Co., N. J., 57 Atl. Rep. 390.

156. RAILROADS—Duty of Licensee to Use Ordinary Care.—A licensee, on a wharf belonging to a railroad company and used for the switching of cars, etc., is charged with the duty of using ordinary care to avoid injury.—Nichols v. Gulf & S. I. R. Co., Miss., 36 So. Rep. 192.

157. RAILROADS—Gates at Crossings.—Act March 16, 1898, P. L. 1898, p. 110, authorizing the chancellor on a petition filed to make an order for gates at a railroad crossing, is not unconstitutional under Const. art. 3, as conferring upon the judiciary powers belonging exclusively to the legislative department.—Exkert v. Perth Amboy & W. R. Co., N. J., 57 Atl. Rep. 438.

158. RAILROADS—Injury to Employee.—The fact that a railroad switchman could have known of the presence of a car, with which the car he was on collided, held not to defeat a recovery by him for injuries.—International & G. N. Ry. Co. v. Reeves, Tex., 79 S. W. Rep. 1099.

159. REFORMATION OF INSTRUMENT—Mutual Mistake. —When there is a mutual mistake, or mistake on one side, and fraud, surprise, or like cause on the other, giving rise to plaintiff's mistake, the court will grant relief.—Jones v. Warren, N. Car., 46 S. E. Rep. 740.

160. RELEASE—Compromise.—A person who, at the execution of a release, knows the exact nature of the writing, cannot invoke his own neglect to ascertain its nature, to impeach it, unless misled by fraud.—Rutherford v. Rutherford, W. Va., 47 S. E. Rep. 240.

161. RELEASE—Consideration.—When there is no consideration for release by insured, held immaterial whether such release was fraudulently obtained, etc.—Woodall v. Pacific Mut. Life Ins. Co., Tex., 79 S. W. Rep. 1090.

162. REMOVAL OF CAUSES—Fraudulent Joinder of Defendant Preventing Removal.—A plaintiff has the right to join a citizen of the same state with a citizen of another state as defendants, although his purpose is to thereby prevent a removal of the cause, if the cause of action is in fact joint.—Gustafson v. Chicago, R. I. & P. Ry. Co., U. S. C. C., D. Mo., 128 Fed. Rep. 85.

163. REMOVAL OF CAUSES—Jurisdiction a Question of Fact.—Where the jurisdiction of the federal court over a case removed from a state court depends upon a question of fact, the existence of such fact must be pleaded in the petition for removal, and on issue joined the burden of proof is on the removing party.—Board of Comrs. of Woodson County v. Toronto Bank, U. S. C. C., D. Kan., 128 Fed. Rep. 157.

164. REWARDS—Authority to Make Offer. — Written offer of reward by county judges for a capture of mur-

derer, as authorized by Rev. St. 1899, §2474, held binding on county, though not placed on records of county court, notwithstanding section 6759.—Cummings v. Clinton County, Mo., 79 S. W. Rep. 1127.

165. SALES—Bill of Lading.—Where bill of lading taken to seller's order is indorsed and attached to draft on purchaser, which bank discounts or takes for collection, no title passes to purchaser until, by payment of draft, he obtains bill of lading.—Grayson County Nat. Bank v. Nashville, C. & St. L. Ry., Tex., 79 S. W. Rep. 1094.

166. SALES—Sale of Defective Machinery.—Where repairs furnished for machinery are defective, the purchaser is entitled to damages to the amount required to replace them with proper repairs, less any value received from the defective repairs.—Hooks Smelting Co. v. Planters' Compress Co., Ark., 79 S. W. Rep. 1052.

167. SEAMEN—Knowledge of Defective Furnace Door.—A fireman on a steamship, who was injured by reason of a defective catch on a furnace door, but who had worked at the furnace for two days, and must have known of the defect, held entitled to recover half damages for the injury.—The Watson, U. S. D. C., E. D. Pa., 128 Fed. Rep. 201.

168. SEARCHES AND SEIZURES — Necessity of Warrant.—No amount of incriminating evidence justifies the search of one's residence for stolen goods, without a warrant for such search having been issued.—McClurg v. Brenton, Iowa, 98 N. W. Rep. 881.

169. SEQUESTRATION — Exemplary Damages.—A verdict for exemplary damages for a wrongful sequestration is authorized only where the writ was sued out wrongfully, maliciously, and without probable cause—Lynch v. Burns, Tex., 79 S. W. Rep. 1084.

170. SHERIFFS AND CONSTABLES — Punitive Damages for Misconduct of Deputy.—A sheriff is not liable for punitive damages for the oppressive misconduct of his deputy, where he did not authorize or ratify it.—Foley v. Martin, Cal., 75 Pac. Rep. 842.

171. STATES—Action for Injunction Under Timber Cutters' Act.—The state in her sovereign capacity may sue for an injunction under the timber cutters' act, embraced in Civ. Code, § 4927, by attaching to the petition as an abstract of title a statement that the land in controversy has never been granted, and that the title thereto is still in the state.—State v. Paxson & Cannon, Ga., 46 S. E. Rep. 872.

172. SPECIFIC PERFORMANCE—Agreement to Maintain Switch.—Bill for specific performance of contract for private siding at grade held not to warrant decree for siding other than at grade.—Swift v. Delaware, L. & W. R. Co., N. J., 57 Atl. Rep. 456.

173. SPECIFIC PERFORMANCE—Parol Contract.—Where a purchaser under a parol contract has been placed in possession, and has paid part of the price, and has made valuable improvements, he may maintain specific performance.—Ratliff v. Sommers, W. Va., 46 S. E. Rep. 712.

174. SPECIFIC PERFORMANCE — Sale of Chattels.—As a rule a contract for the sale of chattels is not the subject of specific performance.—Dorman v. McDonald, Fla., 36 So. Rep. 52.

175. STATUTES—Construction of Penal Statute.—Penal statutes should not be extended by implication, so as to embrace acts not clearly described by such words.—First Nat. Bank v. National Live Stock Bank, Okla., 76 Pac. Rep. 130.

176. STATUTES—Unconstitutional in Part.—A statute may be constitutional only in part, or with regard to certain persons or things, or up to a certain point of its operation, and in other respects unconstitutional.—Watson v. McGrath, La., 36 So. Rep. 204.

177. TAXATION—Commissions for Collection. — Taxes on personal property is a tax payable by the county to the state and county treasurer, in collecting it and turning it over to the state, was the agent of the county and not entitled to commissions thereon.—City of Philadelphia v. Moore, Pa., 57 Atl. Rep. 710.

178. TELEGRAPHS AND TELEPHONES — Franchise for Use in Street.—A telephone company cannot assert an exclusive franchise to occupy the streets of a city with its poles and wires, as against another telephone company obtaining the same right from the city authorities.—American Telephone & Telegraph Co. v. Morgan County Telephone Co., Ala., 36 So. Rep. 178.

179. TRESPASS—Possession of Land.—Though defendant in an action of trespass shown to be a trespasser, she is entitled to credit for such sums as the owner of the land received from her while in possession under lease from strangers to the title.—Hendricks v. Dwyer, N. J., 57 Atl. Rep. 420.

180. TRIAL—Verdict Signed by Seven Jurors.—A verdict, signed by seven jurors only, held a nullity.—Marshall v. Armstrong, Mo., 79 S. W. Rep. 1161.

181. TRUSTS—Accounting.—Premiums paid on investments are to be charged to the principal and not to the income.—*In re* Penn-Gaskell's Estate, Pa., 57 Atl. Rep. 715.

182. VENDOR AND PURCHASER—Option.—A person who has taken an option on land, but has not paid the price in full, is not a purchaser for value without notice.—Tibbs v. Zirkle, W. Va., 46 S. E. Rep. 701.

183. VENDOR AND PURCHASER—Tender of Price.—Tender of the price received is not a condition precedent to the maintenance of an action to rescind a sale for lesion beyond moity.—Ware v. Couvillion, La., 36 So. Rep. 220.

184. WATER AND WATER COURSES—Construction of Ordinance as to Water Rates.—A city ordinance, fixing maxim rates for consumers of water, construed, and held, that the limitation on maxim rates applied only to consumers of the class designated in the ordinance.—Wilson v. Tallahassee Waterworks Co., Fla., 36 So. Rep. 63.

185. WILLS—Construction.—A devise of property for lives in being is valid, though it is possible that the limitation over may not take effect, because of failure of the class to take thereafter.—Loyd v. Loyd's Ex'r., Va., 46 S. E. Rep. 687.

186. WILLS—Construction.—A will, if expressions of a will indicate that testator intends that any clause shall speak from a different date than of his death, will be given that effect.—Voorhees v. Otterson, N. J., 57 Atl. Rep. 428.

187. WILLS—Holographic.—A holographic will of an illiterate testatrix held not conditional, though beginning: "I am going on a journey and may not return, and if I do not this is my last request."—Eaton v. Brown, U. S. S. C., 24 Sup. Ct. Rep. 487.

188. WILLS—Rule in Shelley's Case.—Where a devise of property is to the devisee for life, and, should the devisee "die without leaving any child or children, the property which I have given her to be divided among the rest of my heirs," the rule in Shelley's Case does not apply.—Hauser v. Craft, N. Car., 46 S. E. Rep. 756.

189. WITNESSES—Affidavits.—An affidavit containing other statements by a witness than those about which he was questioned held inadmissible to contradict his testimony.—Leggett v. City of Watertown, 86 N. Y. Supp. 982.

190. WITNESSES — Competency. — On an issue as to whether defendant had revoked his guaranty of notes, testimony of his attorney as to his advice that defendant should do so held incompetent.—Lincoln Nat. Bank v. Fischer-Hansen, 86 N. Y. Supp. 1093.

191. WITNESSES—Credibility.—The statement of an immaterial matter does not affect the credibility of a witness.—Hendley v. Globe Refinery Co., Mo., 79 S. W. Rep. 1163.

192. WITNESSES—Good Reputation of Defendant.—A witness testifying to the good reputation of defendant, on trial for murder, may be asked on cross-examination if he had heard of a previous assault by defendant on deceased.—State v. Brown, Mo., 79 S. W. Rep. 1111.